Before the
COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of	)	
Notice and Recordkeeping For Use Of Sound Recordings Under Statutory License	)	Docket No. 2005-2

MOTION TO PERMIT LATE FILING OF SUPPLEMENTAL COMMENTS

Royalty Logic, Inc. ("RLI") respectfully moves for leave to file late comments responding to the Supplemental Request for Comments (Fed. Reg. dated July 27, 2005) regarding Notice and Recordkeeping for the Use of Sound Recordings Under Statutory License (the "Supplemental Request").

It is not clear that RLI's motion should be reviewed with reference to the two-part test under governing regulations regarding late petitions to participate in a proceeding. Nonetheless, the facts set forth below fully satisfy the two-part test for accepting a late-filing. Therefore, RLI requests that this motion be granted.

1. RLI is an agent designated by affiliated copyright owners and performers pursuant to 17 U.S.C. §112(e)(2), §114(e)(1), §114(g)(3) to collect and distribute royalties pursuant to the relevant statutory licenses addressed by the Supplemental Request.[1] RLI's expertise in the matters for which comments were requested can aid

[1] The RLI affiliates include entitled party interests (i.e., featured performing artists and/or copyright owners) in sound recordings featuring such artists as: The Rolling Stones, Metallica, Dr. Dre, Paul Anka, Ray Charles, The Animals, Little Richard, Jimi Hendrix, Patsy Cline, Billie Holiday, Ella Fitzgerald, The

the Copyright Royalty Board ("CRB") in establishing reasonable notice and recordkeeping requirements.

2. The rules and procedures of the CRB indicate that the Copyright Royalty Judges may accept late-filed petitions to participate in a proceeding for "substantial good cause shown, and if there is no prejudice to the participants that have already filed petitions***." (37 USC §351.1(d)) However, this motion does not relate to the filing of a "petition to participate" in a royalty proceeding – the late filing of which might prejudice other parties as they prepare direct cases regarding the distribution of royalties or the establishment of reasonable royalty rates. Instead, this motion relates merely to comments requested in order to aid the CRB in setting reasonable notice and recordkeeping requirements. Therefore, while RLI's motion meets the standard for "substantial good cause" and potential "prejudice", the standards should be relaxed in order to permit the late filing.

3. Substantial good cause supports RLI's motion to accept late filing of supplemental comments. First, the RLI filing was addressed and sent, prior to the due date, in accordance with the procedures outlined in the Supplemental Request which provide: "If [comments are] sent by mail (including overnight delivery using United States Postal Service Express Mail), an original and five copies of comments...must be addressed to: Copyright Royalty Board, P.O. Box 70977, Southwest Station, Washington, DC 20024-0977." The original RLI filing was sent on August 25, 2005 via overnight delivery using the United States Postal Service Express Mail for delivery on August 26, 2005. Attached, as Appendix B, are copies of the address slip and receipt

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Ink Spots, The Mills Brothers, Sarah Vaughn, etc. RLI's affiliates also include sizable catalogues of Spanish language, children's, electronic, house and dance music.

from the United States Postal Service. Acceptance of the RLI motion will merely correct a technical late delivery that occurred, for reasons known only by the United States Postal Service, after RLI complied with the delivery requirements of the Supplemental Request. Second, RLI's responses to the highly technical questions in the Supplemental Request, include the contribution of experts in systems development and high volume music industry data processing which will be useful to the CRB in fulfilling its obligations to establish reasonable requirements for delivery of records of use of sound recordings. RLI comments will reflect many years of experience of Music Reports, Inc.[2], in data exchange protocols, as the leading administrator of the "per program" license, which is available to broadcasters under the Department of Justice consent decrees with ASCAP and BMI.

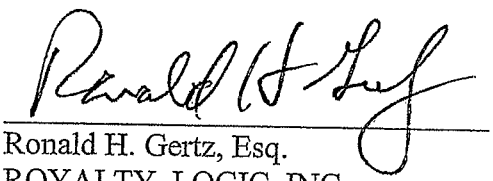
4. Furthermore, no party providing responses to the Supplemental Request would be prejudiced if RLI's motion is granted. No licensee, copyright owner, performer or common agent of a royalty claimant would suffer any impairment of its ability to participate or proceed in the regulatory process that will establish the reasonable notice and recordkeeping requirements.

5. Given the absence of any prejudice or disruptive effect if RLI's motion is granted, and the strong showing of substantial good cause, RLI respectfully submits that the facts of this case fully satisfy the two-part test to permit late filing.

WHEREFORE, RLI requests that its Motion be granted, and that the CRB accept the late filing of RLI's comments in response to the Supplemental Request for Comments

(Fed. Reg. dated July 27, 2005) regarding Notice and Recordkeeping for the Use of Sound Recordings Under Statutory License submitted herewith at Appendix B.

Respectfully submitted,



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www.royaltylogic.com

Date: September 2, 2005

[2] RLI has entered into a business services agreement with Music Reports, Inc. ("MRI") pursuant to which MRI provides certain systems development, maintenance and data processing services to RLI.

Customer Co
Label 11-B September

ER 085160884 US

EXPRESS MAIL
UNITED STATES POSTAL SERVICE®

Post Office To Address

ORIGIN (POSTAL USE ONLY)

PO ZIP Code: 91201	Day of Delivery: ☒ Next ☐ Second	Flat Rate Envelope: ☐ 12.85
Date In: Mo. 8 Day 25 Year 05	☐ 12 Noon ☐ 3 PM	Postage: $
Time In: ☐ AM ☒ PM	Military: ☐ 2nd Day ☐ 3rd Day	Return Receipt Fee
Weight: lbs. 14 ozs.	Int'l Alpha Country Code	COD Fee: $ / Insurance Fee
No Delivery: ☐ Weekend ☐ Holiday	Acceptance Clerk Initials	Total Postage & Fees: $ 13.65

DELIVERY (POSTAL USE ONLY)

Delivery Attempt: Mo. Day	Time: ☐ AM ☐ PM	Employee Signature
Delivery Attempt: Mo. Day	Time: ☐ AM ☐ PM	Employee Signature
Delivery Date: Mo. Day	Time: ☐ AM ☐ PM	Employee Signature

CUSTOMER USE ONLY

PAYMENT BY ACCOUNT
Express Mail Corporate Acct. No.

Federal Agency Acct. No. or Postal Service Acct. No.

☐ WAIVER OF SIGNATURE (Domestic Only)
Additional merchandise insurance is void if waiver of signature is requested.
I wish delivery to be made without obtaining signature of addressee or addressee's agent (if delivery employee judges that article can be left in secure location) and I authorize that delivery employee's signature constitutes valid proof of delivery.

☐ NO DELIVERY ☐ Weekend ☐ Holiday

Customer Signature

FROM: (PLEASE PRINT) PHONE (818) 558-1400

Ron Gertz, Esq.
Royalty Logic, Inc.
405 Riverside Drive
Burbank, CA 91506

TO: (PLEASE PRINT) PHONE (202) 707-8350

Bruce G. Forrest
Interim Chief Copyright Royalty Jud
Copyright Royalty Board
P.O. Box 70977 Southwest Station
Washington D.C.

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Sales Receipt

Product Description	Sale Qty	Unit Price	Final Price
WASHINGTON DC 20024 EM			$13.65
RO-Add Flat Rate			
Serial Number ER085160884US			
Next Day Noon / Normal Delivery			
Customer Postage			-$13.65
Subtotal:			$0.00
Total:			$0.00

Paid by:

Bill#: 1000402179518
Clerk: 04

All sales final on stamps and postage.
Refunds for guaranteed services only.
Thank you for your business.
Customer Copy

Appendix A

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. Under figure 2–1, paragraph (34)(g), of the Instruction, an "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add new temporary § 165.T07–036 to read as follows:

§ 165.T07–036 Safety Zone; Charleston, SC.

(a) *Regulated Area.* The Coast Guard is establishing a temporary safety zone on the waters of the Wando River, Cooper River, and Charleston Harbor from the Hobcaw Yacht Club to the Charleston Harbor Marina and from the coast of Mount Pleasant to 150 yards offshore.

(b) *Regulations.* In accordance with the general regulations in 165.23 of this part, anchoring, mooring or transiting the Regulated Area is prohibited unless authorized by the Coast Guard Captain of the Port or Coast Guard Patrol Commander.

(c) *Effective Date.* This rule is effective from 7 a.m. until 11 a.m. on May 21, 2005.

Dated: April 18, 2005.

D.W. Murk,

Lieutenant Commander, U.S. Coast Guard, Acting Captain of the Port, Charleston, South Carolina.

[FR Doc. 05–8351 Filed 4–26–05; 8:45 am]

BILLING CODE 4910–15–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 270

[Docket No. RM 2002–1H]

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office of the Library of Congress is proposing regulations for the delivery and format of records of use of sound recordings under two statutory licenses of the Copyright Act.

DATES: Comments are due no later than May 27, 2005.

ADDRESSES: If hand delivered by a private party, an original and ten copies of any comment should be brought to Room LM–401 of the James Madison Memorial Building between 8:30 a.m. and 5 p.m. and the envelope should be addressed as follows: Copyright Office General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM–401, 101 Independence Avenue, SE., Washington, DC 20559–6000. If hand delivered by a commercial courier, an original and ten copies of any comment must be delivered to the Congressional Courier Acceptance Site located at Second and D Streets, NE., Washington, DC, between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Copyright Office General Counsel, Room LM–403, James Madison Memorial Building, 101 Independence Avenue, SE., Washington, DC. If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and ten copies of any comment should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024–0977. Comments may not be delivered by means of overnight

delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing such deliveries.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., P.O. Box 70977, Southwest Station, Washington, DC 20024–0977. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION: This Notice of Proposed Rulemaking ("NPRM") marks another step in the Copyright Office's continuing efforts to adopt regulations that require eligible digital audio services availing themselves of the statutory licenses set forth in 17 U.S.C. 112 and 114 to report their usage of sound recordings. On March 11, 2004, the Office published interim regulations in the **Federal Register** setting forth the types of information that must be kept by a digital audio service for each copyrighted sound recording it transmits to its users. 69 FR 11515 (March 11, 2004). This information constitutes a record of use of a sound recording. In this document, we propose regulations to establish the format in which each record of use must be kept, along with directions for delivery of the data to the Receiving Agent (SoundExchange, Inc.).[1]

Before discussing the substance of this NPRM, the Copyright Office notes that the Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, goes into effect on May 31, 2005. Under this legislation, responsibility for notice and recordkeeping regulations under the section 112 and 114 statutory licenses is transferred from the Librarian of Congress and the Copyright Office to the new Copyright Royalty Judges ("CRJs"). See 17 U.S.C. 114(f)(4)(A) & 112(e)(4) (effective May 31, 2005). It is the intention of the Office to receive comments on the rules proposed below by May 27. It is anticipated that the CRJs will assume responsibility for this ongoing rulemaking proceeding as of May 31 and will consider this notice, the comments received in response to the notice, the prior record of this proceeding and any additional comments that they may solicit as they conclude this rulemaking.

I. Overview

Digital audio services transmit performances of copyrighted sound recordings of music for the listening enjoyment of the users of those services. In order to transmit these performances, however, a digital audio service must license the copyrights to each musical work, as well as the sound recording of the musical work.[2] With respect to the copyright in the sound recording, the digital audio service may seek to obtain a licensing agreement directly with the copyright owner or, if it is an eligible service,[3] may choose to license use of the sound recording through statutory licenses set forth in the Copyright Act, title 17 of the United States Code. There are two such licenses that enable an eligible digital audio service to perform a copyrighted sound recording for its listeners: Section 114 and section 112 of the Copyright Act. Section 114 permits an eligible digital audio service to perform copyrighted sound recordings to its listeners, provided that the terms and conditions set forth in section 114 are met—including the payment of a royalty fee. Section 112 permits an eligible digital audio service to make the digital copies of a sound recording that are necessary to transmit a sound recording to listeners, provided again that the terms and conditions set forth in section 112, including the payment of a royalty fee, are met.

The royalty fees collected under the two statutory licenses are paid to a central source known as a Receiving Agent. See 37 CFR 261.2. Before the Receiving Agent,[4] or other agents designated to receive royalties from the Receiving Agent, can make a royalty payment to an individual copyright owner, they must know how many times the eligible digital audio service made use of the sound recording and how many listeners received it. To obtain this information, both section 112 and section 114 direct the Librarian of Congress to prescribe regulations that identify the use of copyrighted sound recordings, as well as provide copyright owners with notice that a particular eligible digital audio service is making use of the section 112 and/or 114 license. See 17 U.S.C. 112(e)(4) and 114(f)(4)(A).

Interim regulations setting forth the types of information that constitute a record of use of a particular sound recording have already been adopted. 69 FR 11515 (March 11, 2004). Questions remain, however, regarding the organization and format of the record of use data and the acceptable means of delivering that data to the Receiving Agent, SoundExchange. Format and delivery are highly complex technical matters and have been a great source of contention between the parties that have submitted comments in this docket. It was hoped that representatives of copyright owners, performers, and licensees could resolve the issues through private negotiation, and the Copyright Office encourages continued discussions. Nevertheless, we must proceed with regulations. As with the interim regulations adopted last year, the regulations proposed in this document represent the baseline requirements. In other words, digital audio services are free to negotiate other formats and technical standards for data maintenance and delivery and may use those in lieu of regulations adopted by the Copyright Office, provided that SoundExchange finds them acceptable. We have no intention of codifying these variances in the future unless and until they come into such standardized use as to supersede the existing regulations.

II. Data Contained in a Record of Use

As noted above, the details of the types of information that must be reported for a record of use of a sound recording are set forth in the Interim Regulations. *Id.* For purposes of discussing the format a record of use must take, we summarize the required data elements.

Each record of use must contain at least six separate elements of data identifying the sound recording. The first four mandatory elements are: The name of the digital audio service reporting the record of use; the transmission category code that identifies under what royalty fee the sound recording was used; the name of the featured artist appearing on the sound recording; and the title of the sound recording. For the fifth and sixth reporting elements, services have an option on the information to report. For the fifth element—the identification of the sound recording—services must report the International Standard Recording Code ("ISRC") solely, or in lieu of the ISRC, they must report the name of the album on which the used sound recording appears plus the name of the company that markets the album.

[1] For more information on the history of this rulemaking proceeding, including comments received from the public and the transcript of a public roundtable, go to *http://www.copyright.gov/carp/114/index.html*.

[2] Recorded music typically involves two separate copyrights. There is a copyright for the song itself—the lyrics and the music—and there is a separate copyright for the sound recording of the music. The copyright to the musical work typically belongs to the songwriter and/or his or her music publisher, and the copyright to the sound recording is owned by the record company that recorded it.

[3] These services are defined as preexisting subscription services, preexisting satellite digital audio radio services, business establishment services, nonsubscription services and new subscription services. These services are further discussed, *infra*.

[4] SoundExchange, Inc., originally created by the Recording Industry Association of America, Inc. on behalf of its member companies, is currently the Receiving Agent for receiving both section 112 and 114 royalties.

For the sixth element—total number of performances of the sound recording during the reporting period—services must report the actual total number of performances of the sound recording, or in lieu of that, the "Aggregate Tuning Hours" (total hours of programming transmitted by the service multiplied by the total number of listeners who have accessed the service during the reporting period) plus the name of the channel or program on which the sound recording was performed.

These are pieces of information that are required to create a report of use of a sound recording for the section 112 and/or 114 statutory license. We now turn to how this information is to be organized and formatted.

III. Organizing and Formatting the Data

The matter of the organization and format in which recordkeeping data is to be maintained for delivery to agents specified in the Copyright Office regulations to receive section 112 and 114 royalties is the subject of considerable disagreement between copyright owners and users. The first issue of dispute is whether services may elect to maintain records in either electronic or hard copy form, or whether reporting must be made in electronic form only. As noted above, the Copyright Office met with representatives of both owners and users after the May 10, 2002, roundtable to discuss the matter of format and solicited written proposals and conducted a public meeting. See 67 FR 59574 (September 23, 2002). During the course of those discussions, the Office expressed the view that transfer of hard copy records of performances would be cumbersome, expensive, and of little or no value to the royalty distribution process. We have not been persuaded otherwise by the written comments submitted in this docket or the subsequent discussions on format of data. Consequently, we are proposing that records of use must be in electronic format and that delivery of physical hard copies of records of use of sound recordings is not acceptable. We welcome further comment.

Having proposed that records of performances must be kept in electronic format, we turn to the details of organizing and formatting the data. Recognizing that there is a wide variance in the technical sophistication of services for creating records of use, the Copyright Office is proposing a two-track approach. For those services with minimal technical sophistication or resources, the Office is proposing that they supply record of use data in a standard electronic spreadsheet format. For those services that eschew use of a spreadsheet, the Office is proposing the technical requirements for formatting.

A. Use of a Spreadsheet

As noted above, there are likely a number of services—noncommercial broadcasters, for example—that lack the technical knowledge or ability to assemble their record of use data and format it according to the requirements set forth in subpart B of this section. For these types of services, the use of a widely marketed electronic spreadsheet, such as Microsoft's Excel or Corel's Quattro Pro, will be the most accessible and understandable method for completing a record of use. In order to make use of one of these spreadsheets, it is necessary for services to follow a template that organizes the data elements prescribed by the Interim Regulations in a way acceptable to the needs of SoundExchange. This necessitates that records of use maintained by a service in a spreadsheet format must be converted by the service into an American Standard Code for Information Interchange ("ASCII") text file that conforms to the format specifications set forth below.

To facilitate the use of spreadsheets by services, the Office is proposing that SoundExchange post on its Web site a template for creating a record of use of sound recordings using Microsoft's Excel spreadsheet and Corel's Quattro Pro spreadsheet. SoundExchange may choose to post templates for other spreadsheet programs as well. A service may then use the corresponding spreadsheet software and enter its record of use data as provided by the template. Any technical support necessary for the establishment and use of spreadsheets is the responsibility of the service and not SoundExchange.

B. Format Specifications

What follows is a description of the format specifications that the Office proposes must be followed by services in preparing a record of use for delivery to SoundExchange, whether the records are in an electronic spreadsheet or some other organizational format chosen by the service. In proposing these regulations, the Office was guided by one of the few points of agreement to arise from the written and oral comments submitted in this docket. There are no universal methods of operation or uniform business standards for services making use of the section 112 and 114 licenses. Some services are highly automated, employing computers and software that allow them to readily generate play lists and detailed information in electronic format regarding the sound recordings that they perform. Others possess less sophisticated equipment that utilize varying data storage formats. Accordingly, the Office proposes that services be permitted to elect from several means of delivering their records of use to SoundExchange and that services be permitted to elect whether to submit files with or without headers. Services that wish to use different formats or different means of delivery may do so with the consent of SoundExchange.

The Office proposes to adopt organization and formatting requirements that represent the essentials for creating records of use of sound recordings and for the delivery of the records once they have been created. Our purpose in electing such approach is to provide SoundExchange with the information it needs to distribute royalties collected under the section 112 and 114 licenses, but also permit significant flexibility to those services which possess greater sophistication and can deliver data in faster and more convenient ways. Several of the commenters in this docket have stated that they have developed, or are in the process of developing, computer software and operating systems that will readily permit the recording and delivery of highly detailed information regarding the use of sound recordings. Provided that these software programs and operating systems are compatible with the systems of the receiving and designated agents collecting monies under the section 112 and 114 licenses, they should be permitted and encouraged. The Office encourages the continued use and development of alternatives that reduce the burden and operating expenses of both the services creating the data and the agents receiving it.

1. *File Naming.* Every file containing records of use must be appropriately named. The file name should contain the name of the service submitting the file followed by the start and end date of the reporting period. The start date and end date should be separated by a dash, and the file name should end with a file type extension of ".txt". Starting and ending dates should be in the format of day, month and year (DDMMYYYY) where DD is the two-digit day of the log period (beginning or end); MM is the two-digit month of the log period; and YYYY is the four-digit year of the log period (beginning or end). Single-digit days and months should be preceded by a zero (*e.g.* The first day of January of 2004 should be identified as 01012004).

The following is an example of a complete file name: *AcmeMusicCo10102004–30042004.txt.*

2. *File type.* As discussed above, all files must be delivered in ASCII format. This applies to records of use that are maintained by a service in spreadsheet format, as well as any other data format that a service employs for its records of use. Files must not be attributed with any operating system settings that do not allow the file to be read using widely used Extract, Transform and Load ("ETL") software (*e.g.* Oracle SQL Loader, Informatica, Sagent, Teradata, etc.).

3. *File compression.* Each report of use should be compressed in one of the following formats:

.zip—generated using utilities such as WinZip and/or UNIX zip command
.Z—generated using UNIX compress command
.gz—generated using UNIX gzip command

The zipped file should follow the same naming convention described in B1 above. However, instead of the ".txt" file extension, the file extension should be one of the above-described compression names.

4. *Delivery mechanism.* The Copyright Office is proposing four separate means for delivery of data to receiving and designated agents. As with the other provisions of these proposed regulations, parties are encouraged to negotiate alternative acceptable means of delivery if the prescribed methods discussed below are not acceptable.

Of the four acceptable methods of data delivery, two are by ~~electronic~~ delivery (FTP and e-mail) and two are by physical delivery (CD–ROM and Floppy Diskette). The Copyright Office has considered permitting delivery of data files via Internet Web site, but there appear to be significant issues regarding security of data delivered to Web sites and who would bear the burden of assuring security is maintained. We welcome further comment on this issue.

a. File Transfer Protocol (FTP). File Transfer Protocol is an electronic delivery mechanism that permits services using the section 112 and 114 licenses to deposit a computer file on a password-secured site operated by a receiving or designated agent. A service choosing FTP as the means of data file delivery must obtain a username and password, plus specific instructions for delivery, from the receiving or designated agent to which data is being sent. The Office is proposing that no later than 60 days from publication of final regulations SoundExchange be required to post on a publicly available portion of its Web site instructions for applying for a username and password and access and delivery instructions for FTP delivery. The Office proposes that once a written request has been made for a username and password, SoundExchange shall have 15 days to respond.

b. Electronic mail (e-mail). The other acceptable means of electronic delivery of record of use files is electronic mail (e-mail). A record of use file may be appended to an e-mail as an attachment and sent to the e-mail address identified for SoundExchange. The main body of the e-mail should identify: (1) The full name of the service and its full address; (2) the name of a contact person and that person's telephone number and e-mail address; (3) the start and end date of the reporting period; (4) the number of rows in the data file (if using headers, beginning with row 15; otherwise, beginning with row 1); and (5) the name of the file attached.

Unlike delivery to an FTP site, there are frequently file size limitations imposed by the Internet Service Provider offering the e-mail service. To avoid the problems likely to be associated with e-mailing large files, the Copyright Office is proposing to limit the size of file attachments to ten megabytes. Services may compress their files using the data compression methods described above in order to satisfy the ten-megabyte limitation.

Upon receipt of a report of use, the Office is proposing that SoundExchange acknowledge receipt of the e-mail as soon as possible through use of an automated reply e-mail to the delivering party.

c. Compact Disk-Read Only Memory (CD–ROM). A report of use contained on a Compact Disk-Read Only Memory (CD–ROM) should be delivered to the addresses identified below for SoundExchange. The data file must be sufficiently compressed to fit onto a single CD–ROM per reporting period. Each CD–ROM submitted shall be accompanied by a cover letter identifying: (1) The full name and address of the service; (2) the name of a contact person and that person's telephone number and e-mail address; (3) the start and end date of the reporting period; (4) the number of rows in the data file (if using headers, beginning with row 15; otherwise beginning with row 1); and (5) the name of the file attached.

d. Floppy diskette. A report of use contained on a floppy diskette that measures 3.5 inches in diameter should be delivered to the addresses identified for the receiving and designated agents. The diskette should be formatted using MS/DOS and be contained on a single diskette. No more than one floppy diskette may be submitted per reporting period. The diskette must be accompanied by a cover letter identifying: (1) The full name and address of the service; (2) the name of a contact person and that person's telephone number and e-mail address; (3) the start and end date of the reporting period; (4) the number of rows in the data file (if using headers, beginning with row 15; otherwise, beginning with row 1); and (5) the name of the file attached.

5. *Delivery addresses.* All reports of use should be delivered to SoundExchange at the following address: SoundExchange, Inc., 1330 Connecticut Avenue, NW., #330, Washington, DC 20036; (Phone) (202) 828–0120, (Facsimile) (202) 833–2141, (E-mail) *info@soundexchange.com; http://www.soundexchange.com.* For those services choosing to use CD–ROMs or floppy diskettes which require physical delivery to SoundExchange, the Copyright Office does not propose to specify whether delivery should be by hand, by courier or by U.S. mail. It is recommended, however, that services elect a type of delivery service that provides proof that the data file was sent in a timely fashion (*e.g.* certified mail, return receipt requested). It is the responsibility of the service to assure that its report of use is delivered on time to SoundExchange.

6. *File contents.* SoundExchange proposes that data files be reported with or without headers at the discretion of the service. The services find the option attractive; and consequently, the Office is inclined to permit the reporting of data either with or without headers.

In reporting data files, the issue arises as to how many separate files of data should be allowed for each reporting period. SoundExchange desires only one file per statutory license. Services, in particular broadcaster services, would like to submit multiple files of data and require the agent receiving data to match up, or overlay, the data from one file to another. For example, the National Religious Broadcasters Music Licensing Committee ("NRBMLC") and Salem Communications Corp. submit that data identifying artists, song titles, albums and marketing labels could be reported in one file, while the data concerning the number of performances of the sound recordings could be reported in another file. Comments of NRBMLC and Salem Communications Corp. at 4–5 (submitted September 30, 2002). They submit that reporting in separate files is necessary because information regarding the number of

performances of sound recordings will come from a different source than the identifying information for the sound recordings. Allowing submission of multiple files of data will, in our view, unduly burden the agent processing the data and likely result in confusion and a high error rate in attempting to overlay the data. While reporting data in multiple files is undoubtedly easier for some services, they have not yet demonstrated that such a practice can be done efficiently without significant error and expense to the processing agent. We welcome further comment from the services as to a solution to this problem.

a. Files with headers. Submission of data with headers is an issue of considerable disagreement between SoundExchange and certain services using the section 112 and 114 licenses. See, *e.g.* Comments of SoundExchange at Tab A (submitted September 30, 2002); Comments of NRBMLC and Salem Communications Corp. at 4–6 (submitted October 10, 2002). While the parties agree that submission of files with headers should be permitted, the disagreements occur over the information to be contained in the headers. SoundExchange proposes that every report of use of a sound recording be prefaced with a header that contains 13 separate rows of information, most of which is devoted to identifying the service submitting the report. Certain services counter that submission of identification information for each report is redundant and unnecessary. Comments of NRBMLC and Salem Communications Corp. at passim (submitted October 10, 2002). They advocate a "flexible" approach to headers that only identifies the fields of data being reported (*i.e.* artist, song title, album, etc.) and permits such headers to be embedded in the file as the first line of data or provided in a separate file. Further, they advocate that output files generated by a service's music scheduling or digital automation software should be deemed acceptable if they contain headers identifying the data fields contained therein. Comments of NRBMLC and Salem Communications Corp. at Tab A, pp. 3–4 (submitted September 30, 2002).

In attempting to resolve this dispute, the Copyright Office observes that while a balancing of both owner and user interests is desirable, we are ultimately charged with the task of creating a system that will work. We have repeatedly encouraged the parties to negotiate the formatting of data for records of use but without success. Broadcaster services assert that their recordkeeping will be in multiple formats and that they cannot comply with a single standard. SoundExchange asserts that its system will not work unless the format it proposes is adopted. Because the statute requires us to adopt record of use regulations that will facilitate the distribution of royalties to copyright owners of sound recordings, we propose to adopt SoundExchange's recommendation for files with headers. In taking this approach, the Office observes that services which find the requirements for files with headers to be unduly burdensome may instead choose to submit their data without headers as provided in subsection (b) below.

A file with headers is a file that contains, among other things, information identifying the service, the period for which data is being provided and column headers that identify the data elements in each column. The following elements shall occupy the first 13 rows of each report of use in the order specified below.

(i) Name of service. The first row of a report with headers should contain the full name of the service making the report. Example: Acme Music Service, Inc. The maximum length and description of the service name should not exceed 255 alphanumeric characters.

(ii) Contact person. The second row of a report with headers should contain the full name of the contact person responsible for technical matters related to the submission of the report of use. The maximum length and description of the contact person should not exceed 255 alphanumeric characters.

(iii) Street address. The third row of a report with headers should contain the full business street address of the service submitting the report of use. The "#" symbol should be used to indicate suite or room numbers in the street address. The maximum length and description of the street address should not exceed 255 alphanumeric characters.

(iv) City, state and zip code. The fourth row of a report with headers should contain the city, state and zip code of the service submitting the report of use. The maximum length and description of the city, state and zip code should not exceed 255 alphanumeric characters.

(v) Phone number. The fifth row of a report with headers should contain the phone number of the contact person for technical issues of the service submitting the report. The maximum length and description of the phone number should not exceed 255 alphanumeric characters.

(vi) E-mail address. The sixth row of a report with headers should contain the e-mail address for the contact person for technical issues of the service submitting the report. The maximum length and description of the e-mail address should not exceed 255 alphanumeric characters.

(vii) Start of reporting period. The seventh row of a report with headers should contain the beginning date of the reporting period for the service submitting the report.[5] The date should include the day, followed by the month followed by the year (DDMMYYYY). Single-digit days or months should be preceded by a zero. Example: the first day of January 2006 should appear as 01012006. Thus, the length of the start of the reporting period should be eight numeric characters.

(viii) End of reporting period. The eighth row of a report with headers should contain the last or ending date of the reporting period (*i.e.* March 31, June 30, September 30 or December 31). As with the starting date, the date should be eight numeric characters with the day, month and year in that order.

(ix) Report generation date. The ninth row of a report with headers should contain the date that the report was generated by the service submitting the report. The date should be consistent with the file generation date tagged to the zipped container file or the report file and be expressed in the eight numeric DDMMYYYY format described above.

(x) Number of rows. The tenth row of a report with headers should contain the total number of rows beyond the fourteenth row in the file. The first 13 rows of each report file are for the header information only, and the fourteenth row is for the column headers described below. There is no limitation on the maximum length and description of the number of rows.

(xi) Text indicator. The eleventh row of a report with headers is the identification of the character that delineates the beginning and end of a text field. The text indicator is a one-character symbol that must be unique and never found in the report's data content. While the Copyright Office is not specifying the text indicator at this time, it is recommending the adoption of the carat ("^") symbol as an appropriate text indicator. The text indicator differs from a delimiter because it is only found at the beginning and end of a text field. Examples: ^Sound Recording Title ^; ^Featured Artist ^. Numbers and dates never have text indicators.

[5] The reporting periods are each calendar quarter of the year—*i.e.* the quarters beginning January 1, April 1, July 1 and October 1.

In addition, text indicators must be used even when certain text elements are not being reported. For example, if the service does not have information for the Marketing Label for a sound recording, the service should denote the missing data with a sequence of two consecutive text indicators to show that no text for the field is available (*i.e.* "^^").

(xii) Field delimiter. The twelfth row of a report with headers is the identification of the character that delineates the end of a data field. It differs from a text indicator because it is found at the end of both text fields and numeric fields. Field delimiters should not be placed at the end of the last data element in a row of data. The field delimiter character must be unique and never found in the report's data content. As with the text delimiter, the Copyright Office is not specifying the field delimiter at this time, but does recommend adoption of the pipe ("|") as an appropriate field delimiter. Delimiters must be used even when certain elements are not being reported. In this case, the service should denote the blank data field with a delimiter in the order in which it would have appeared.

(xiii) Blank line. The thirteenth row of a report with headers is the carriage return and should be left blank.

The above describes the required first 13 rows of a report with headers. The fourteenth row should contain the report headers which are prescribed in the Interim Regulations (Featured Artist, Sound Recording Title, Marketing Label, etc.). See 37 CFR 270.1 *et seq.* Underscores ("_") should appear in the report header between elements of each field name to show separation in the data field titles. Report header file names should be listed using the same text indicator and field delimiter indicated in the header.

The fifteenth row of the data file is where the actual records of use of sound recordings shall begin to appear. The data text fields should be reported in upper case characters. All featured performers should be reported as FIRST NAME_LAST NAME, where the name of the featured performer is an individual. Abbreviations are not permitted. Services should take care in providing data that conforms with the data that appeared on the physical product containing the sound recording that was supplied to or used by the service, and avoid using colloquialisms or short-handed methods of data entry (ex. "JENNIFER_LOPEZ" is the correct data entry for the artist, not "J_LO").

A carriage return must be at the end of each line and all data for one sound recording must be on a single line.

The following is a table summarizing the first 13 rows of a file with headers, including identification of the data that is required for each field, followed by an example.

Row No. (Do not include row numbers)	Field definition (Do not include field definition description)	Example
1	Service full name	ACME MUSIC SERVICE.
2	Contact Person	JOHN DOE.
3	Street Address	1000 WASHINGTON STREET.
4	City, State, Zip	WASHINGTON, DC 10000.
5	Phone	202–555–1212.
6	E-mail	*DOE@ACMEMUSIC.COM.*
7	Start of Reporting Period (DDMMYY)	01012006.
8	End of Reporting Period (DDMMYY)	31032006.
9	Report Generation Date (DDMMYY)	15042006.
10	Number of rows	60000.
11	Text Indicators	^.
12	Field delimiters	|.
13	Blank line.	

b. Files without headers. The previous regulation adopted by the Copyright Office for records of use by preexisting subscription services, 37 CFR 270.2(g), specifies the reporting of data without headers. These provisions have operated successfully, and the Office is proposing that they be adopted in this docket with some slight modifications to avoid duplication of information. Data files without headers should meet the following format requirements:

(1) ASCII delimited format, using pipe (|) characters as delimiters, with no headers or footers;

(2) Carets (^) should surround strings;

(3) No carets (^) should surround dates and numbers;

(4) A carriage return must be at the end of each line;

(5) All data for one record should be on a single line; and

(6) Abbreviations within data fields are not permitted (ex. The artist "JOHN LEE HOOKER" should not be abbreviated as "J.L. HOOKER"). All text fields should be reported in upper case characters (ex. "THE ROLLING STONES"). All featured performers should be reported as FIRST NAME_LAST NAME, where the name of the featured performer is the name of an individual. Services should take care in providing data that conforms with the data that appeared on the physical product containing the sound recording that was supplied to or used by the service, and avoid using colloquialisms or short-hand methods of data entry (ex. "JENNIFER _LOPEZ" is the correct data entry for the artist, not "J _LO").

The following are two examples of a file without headers reporting a record of use of the sound recording "Mixed Emotions" by the Rolling Stones. In the first example, the Acme Music Service is reporting the Album Title and the Marketing Label in lieu of the International Sound Recording Code ("ISRC") and is reporting Actual Total Performances in lieu of Aggregate Tuning Hours ("ATH"), Channel or Program Name and Play Frequency. See 69 FR 11515, 11524 (March 11, 2004). In the second example, My Music Service is reporting the ISRC in lieu of the Album Title and Market Label and is reporting ATH in lieu of the Actual Total Performances. *Id.*

Example #1

^ACME MUSIC SERVICE^|^F^|^THE ROLLING STONES^|^MIXED EMOTIONS^|^STEEL WHEELS^| ^VIRGIN^|^100.00^|||

Example #2

^MY MUSIC SERVICE^|^F^|^THE ROLLING STONES^|^MIXED EMOTIONS^|^ USSM12345678^|||7650.00 |^ROCK^|25.00

List of Subjects in 37 CFR Part 270

Copyright, Sound recordings.

Proposed Regulations

In consideration of the foregoing, the Copyright Office is proposing to amend part 270 of 37 CFR to read as follows:

PART 270—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

1. The authority citation for part 270 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Paragraph (a) in § 270.2 is revised to read as follows:

§ 270.2 Reports of use of sound recordings under statutory license for preexisting subscription services.

(a) *General.* This section prescribes the rules for the maintenance and delivery of reports of use for sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by preexisting subscription services.

* * * * *

3. Section 270.3 is amended as follows:

a. By revising paragraph (a); and

b. By adding a new paragraph (d).

The revision and addition read as follows:

§ 270.3 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

(a) *General.* This section prescribes rules for the maintenance and delivery of reports of use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services.

* * * * *

(d) *Format and Delivery.* (1) *Electronic format only.* Reports of use must be maintained and delivered in electronic format only, as prescribed in paragraphs (d)(2) through (8) of this section. A hard copy report of use is not permissible.

(2) *Use of spreadsheet.* Commercially available spreadsheets (Examples: Microsoft Excel, Corel Quattro Pro) may be utilized for maintaining reports of use: *Provided,* that the spreadsheet format is converted into an ASCII text file that conforms to the format specifications set forth below. SoundExchange shall post and maintain on its Internet website a template for creating a report of use using Microsoft's Excel spreadsheet and Corel's Quattro Pro spreadsheet and instruction on how to convert such spreadsheets to ASCII text files that conform to the format specifications set forth below. However, technical support and cost associated with the use of spreadsheets is the responsibility of the service submitting the report of use.

(3) *Delivery mechanism.* The data contained in a report of use may be delivered by File Transfer Protocol (FTP), e-mail, CD–ROM, or floppy diskette according to the following specifications:

(i) A service delivering a report of use via FTP must obtain a username, password and delivery instructions from SoundExchange. SoundExchange shall not later than [DATE 60 DAYS FROM DATE OF PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**] post on a publicly available portion of its Web site instructions for applying for a username, password and delivery instructions. SoundExchange shall have 15 days from date of request to respond with a username, password and delivery instructions.

(ii) A service delivering a report of use via e-mail shall append the report as an attachment to the e-mail. The main body of the e-mail shall identify:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(iii) A service delivering a report of use via CD–ROM must compress the reporting data to fit onto a single CD–ROM per reporting period. Each CD–ROM shall be submitted with a cover letter identifying:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(iv) A service delivering a report of use via floppy diskette must compress the reporting data to fit onto a single floppy diskette per reporting period. Each floppy diskette must measure 3.5 inches in diameter and be formatted using MS/DOS. Each floppy diskette shall be submitted with a cover letter identifying:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, the counting of the rows should begin with row 1; and

(E) The name of the file attached.

(4) *Delivery address.* Reports of use shall be delivered to SoundExchange at the following address: SoundExchange, Inc., 1330 Connecticut Avenue, NW., #330, Washington, DC 20036; (Phone) (202) 828–0120; (Facsimile) (202) 833–2141; (E-mail) *info@soundexchange.com.*

(5) *File naming.* Each data file contained in a report of use must be given a name by the service followed by the start and end date of the reporting period. The start and end date must be separated by a dash and in the format of day, month and year (DDMMYYYY). Each file name must end with the file type extension of ".txt". (*Example:* AcmeMusicCo01012005-31032005.txt).

(6) *File type and compression.* (i) All data files must be in ASCII format. Files may not be attributed with any operating system settings that do not allow the file to be read using widely used Extract, Transform and Load (ETL) software.

(ii) A report of use must be compressed in one of the following formats:

(A) .zip—generated using utilities such as WinZip and/or UNIX zip command;

(B) .Z—generated using UNIX compress command; or

(C) .gz—generated using UNIX gzip command.

Zipped files shall be named in the same fashion as described in paragraph (d)(5) of this section substituting the ".txt." file extension with the applicable compression name described in this paragraph.

(7) *Files with headers.* (i) If a service elects to submit files with headers, the following elements, in order, must occupy the first 14 rows of a report of use:

(A) Name of service;

(B) Name of contact person;

(C) Street address of the service;

(D) City, state and zip code of the service;

(E) Telephone number of the contact person;

(F) E-mail address of the contact person;

(G) Start of the reporting period (DDMMYYY);

(H) End of the reporting period (DDMMYYYY);

(I) Report generation date (DDMMYYYY);

(J) Number of rows data file, beginning with 15th row;

(K) Text indicator;

(L) Field delimiter;

(M) Blank line; and

(N) Report headers (Featured Artist, Sound Recording Title, etc.).

(ii) Each of the rows described in paragraphs (d)(7)(i)(A) through (F) of this section must not exceed 255 alphanumeric characters. Each of the rows described in paragraphs (d)(7)(i)(G) through (I) of this section should not exceed eight alphanumeric characters. There is no limitation on the maximum length and description in paragraph (d)(7)(i)(J) of this section.

(iii) Data text fields, as required by paragraph (c) of this section, begin on row 15 of a report of use with headers. The data text fields must be in upper case characters and a carriage return must be at the end of each row thereafter.

(8) *Files without headers.* If a service elects to submit files without headers, the following format requirements must be met:

(i) ASCII delimited format, using pipe (|) characters as delimiters, with no headers or footers;

(ii) Carats (^) should surround strings;

(iii) No carats (^) should surround dates and numbers;

(iv) A carriage return must be at the end of each line;

(v) All data for one record must be on a single line;

(vi) Abbreviations within data fields are not permitted; and

(vii) All text fields must be reported in upper case characters.

Dated: April 22, 2005.

David O. Carson,

General Counsel.

[FR Doc. 05–8435 Filed 4–26–05; 8:45 am]

BILLING CODE 1410–33–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03 –OAR–2005–VA–0001; FRL–7904–6]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; NO_X RACT Determinations for Four Individual Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia to establish and require reasonably available control technology (RACT) for four major sources of nitrogen oxides (NO_X). In the Final Rules section of this **Federal Register**, EPA is approving the Commonwealth's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by May 27, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2005–VA–0001 by one of the following methods:

A. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. Agency Web site: *http://www.docket.epa.gov/rmepub/* RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

C. E-mail: *campbell.david@epa.gov.*

D. Mail: R03–OAR–2005–VA–0001, Campbell David, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

E. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to RME ID No. R03–OAR–2005–VA–0001. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov Web sites are an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal that is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 920

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 11, 2004.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

■ For the reasons set out in the preamble, 30 CFR part 920 is amended as set forth below:

PART 920—Maryland

■ 1. The authority citation for part 920 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 920.15 is amended in the table by adding a new entry in chronological order by "Date of Final Publication" to read as follows:

§ 920.15 Approval of Maryland regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* *	* * *
September 16, 2003	March 11, 2004	COMAR 26.20.03.07.A, B; 26.20.03.11; 26.20.05.01, A, B, C, and L; and 26.20.25.02.D.

[FR Doc. 04–5499 Filed 3–10–04; 8:45 am]
BILLING CODE 4310–05–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201 and 270

[Docket No. RM 2002–1E]

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Interim regulations.

SUMMARY: The Copyright Office of the Library of Congress is announcing interim regulations specifying notice and recordkeeping requirements for use of sound recordings under two statutory licenses under the Copyright Act. Electronic data format and delivery requirements for records of use as well as regulations governing prior records of use shall be announced in future **Federal Register** documents.

EFFECTIVE DATE: The interim notice and recordkeeping regulations shall be effective beginning April 12, 2004. Updated notices of intent to use the statutory licenses under sections 112 and 114 are due July 1, 2004.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024–0977. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION:

I. Overview

Digital audio services provide copyrighted sound recordings of music for the listening enjoyment of the users of those services. In order to provide these sound recordings, however, a digital audio service must license the copyrights to each musical work, as well

as the sound recording of the musical work.[1] With respect to the copyright in the sound recording, the digital audio service may seek to obtain a licensing agreement directly with the copyright owner, or, if it is an eligible service,[2] may choose to license the sound recording through statutory licenses set forth in the Copyright Act, title 17 of the United States Code. There are two such licenses that enable an eligible digital audio service to transmit performances of copyrighted sound recordings to its listeners: section 114 and section 112 of the Copyright Act. Section 114 permits an eligible digital audio service to perform copyrighted sound recordings publicly by means of digital audio transmissions to its listeners, provided that the terms and conditions set forth in section 114 are met including the payment of a royalty fee. Section 112 permits an eligible digital audio service to make the digital copies of a sound recording that are necessary to transmit a performance of a sound recording to listeners,[3] provided again that the terms and conditions set forth in section 112 are met including the payment of a royalty fee.

The royalty fees collected under the two statutory licenses are paid to a central source known as a Receiving Agent.[4] *See* 37 CFR 261.2. Before the Receiving Agent, or any other agent designated to receive royalties from the Receiving Agent, can make a royalty payment to an individual copyright owner, they must know how many times the eligible digital audio service made use of the sound recording and how many listeners received it. To obtain this information, both section 112 and section 114 direct the Librarian of Congress to prescribe regulations that identify the use of copyrighted sound recordings (the "recordkeeping" provisions), as well as provide copyright owners with notice that a particular eligible digital audio service is making use of the section 112 and/or 114 license (the "notice" provisions). *See* 17 U.S.C. 112(e)(4) and 114(f)(4)(A). Today's interim regulations are the first step in complying with these requirements.

As discussed more fully *infra*, today's interim regulations set forth the requirements for an eligible digital audio service to file notification that it is using one or both of the statutory licenses, as well as the types and details of information that an eligible digital audio service must maintain in creating a record of use for each copyrighted sound recording it provides its listeners. There are two remaining issues. First, today's interim regulations only apply to the use of sound recordings from the effective date of the interim regulations and prospectively. There remains the issue of what types of information must be reported for uses of sound recordings prior to the effective date of this regulation and back to October 28, 1998. Second, there remains the issue of the character of the format in which records of use must be maintained, and what are the acceptable means of delivering the information contained in records of use to copyright owners of sound recordings.

II. Background

On February 7, 2002, the Copyright Office of the Library of Congress issued a Notice of Proposed Rulemaking ("NPRM") on the requirements for giving copyright owners reasonable notice of the use of their sound recordings under the section 114 and 112 statutory licenses and for how records of such use shall be kept and made available to copyright owners. 67 FR 5761 (February 7, 2002). The proposed regulations set forth in the NPRM were taken, with some modifications, from the notice and recordkeeping regulations the Office had previously adopted for eligible preexisting subscription services making use of the section 114(f)(1)(A) statutory license. *See* 63 FR 34289 (June 24, 1998); 37 CFR 201.35–201.37.[5] The Office stated that although the existing regulations only applied to preexisting subscription services, it was the desire of the Office to adopt a single set of notice and recordkeeping regulations that would apply to any service claiming use of any of the statutory licenses set forth in section 114, as well as the section 112 statutory license for ephemeral recordings. 67 FR at 5762.

With respect to the notice provisions proposed in the NPRM, copyright owners and users voiced little disagreement. The details of the notice requirements being adopted by the Library are discussed below. With respect to what records of use of sound recordings should be kept, how they should be kept and in what manner they should be delivered to copyright owners, there was virtually no agreement between copyright owners and users. On May 10, 2002, the Office held a public meeting to facilitate discussion as to the required records of use, the frequency of the recordkeeping, and the manner and format for delivery to copyright owners. Persons representing copyright owners, users, and performers appeared and offered their opinions and criticisms of the NPRM and offered suggestions as to the amount of information necessary to distribute royalties collected under the section 112 and 114 licenses. The May 10 meeting revealed persistent differences as to the scope of the regulations, as well as the details for creating and delivering databases of records of use.

Subsequent to the May 10 meeting, the Office posted a notice on its website announcing the impending release of these interim regulations and describing in general the categories of information that will be required to be reported for performances of sound recordings governed by the section 112 and 114 licenses. These transitional requirements were memorialized in a September 23, 2002, **Federal Register** document. *See* 67 FR 59573 (September 23, 2002).

The need for announcing these transitional requirements was made evident during the course of discussions at the May 10 roundtable meeting. Although services making use of the statutory licenses in section 114 (other than the preexisting subscription service license) and section 112 have been doing so since the passage of the Digital Millennium Copyright Act in 1998, it became clear that many have not kept any records of the sound recordings which they have performed or the ephemeral copies they have made. This is unacceptable. The law requires a reporting of use of sound recordings sufficient to permit payment of royalties, and each day that passes results in the loss of records of performances that may never be accurately identified and reported. Furthermore, eligible nonsubscription digital transmission services have been required to make royalty payments

[1] Recorded music typically involves two separate copyrights. There is a copyright for the song itself—the music and the lyrics, if any—and there is a separate copyright for the sound recording of that music. The copyright to the musical work often belongs to the songwriter and/or his or her music publisher, and the copyright to the sound recording is generally owned by a record company that released the recording.

[2] These services are defined as preexisting subscription services, preexisting satellite digital audio radio services, business establishment services, nonsubscription services and new subscription services. These services are further discussed, *infra*.

[3] These copies are referred to as "ephemeral copies," although they sometimes exist for a period of time that is far from the ordinary meaning of "ephemeral."

[4] Currently, the Receiving Agent is SoundExchange, Inc. *See* 37 CFR 261.4(c).

[5] These interim regulations place all notice and recordkeeping regulations pertaining to the statutory licenses under sections 112 and 114 into a new part 270. Accordingly, the notice and recordkeeping regulations currently located in §§ 201.35–201.37 have been moved to part 270.

under the section 112 and 114 licenses for eligible nonsubscription digital transmission services since October 20, 2002, meaning that a considerable amount of royalties (over five years' worth) should now be ready for distribution. Royalties cannot be allocated to owners, artists and performers until meaningful information regarding the instances of performances of specific sound recordings of musical works is provided by the services making use of the works. Publication of these interim regulations [6] will preserve the identification and reporting of as many performances under the section 112 and 114 licenses as possible.[7]

III. Prior Records of Use

The interim regulations announced today apply on a prospective basis, meaning that they apply to uses of sound recordings under the section 112 and 114 licenses occurring on and after the effective date announced above. There remains, however, the question of what records of use must be reported for uses of sound recordings from October 28, 1998, until the present. It was apparent from the discussions of the May 10, 2002, roundtable and subsequent filings that many services have maintained few or, in many instances, no records of prior uses. Incomplete and nonexistent records create serious difficulties for the fashioning of regulations that apply to prior uses of sound recordings. The Copyright Office has sought comment on the matter of prior records, *see* 68 FR 58054 (October 8, 2003), and will publish regulations in the future. In the meantime, both copyright owners of sound recordings and users of the section 112 and 114 licenses are strongly encouraged to resolve the matter in a way that will permit SoundExchange to distribute royalties for uses of sound recordings that took place prior to the effective date of these regulations. The Office would be pleased to consider any negotiated resolution as it determines the terms of the regulations to govern reporting on past uses of sound recordings.

IV. Format Requirements

Due to the highly technical nature of delivery of data in an electronic format and the widespread disagreement among SoundExchange and the users of the statutory licenses over formatting, the Copyright Office is unable to adopt data format and delivery regulations at this time. However, we will be publishing soon a Notice of Proposed Rulemaking in the **Federal Register** proposing electronic data format and delivery rules and will be seeking public comment. In the meantime, we strongly urge SoundExchange and services that will be making reports of use to negotiate acceptable means of data formatting and delivery. The negotiation process is better suited to targeting and resolving technical difficulties than an agency rulemaking process. Also, the more agreements that are reached, the greater the body of industry experience and practice that the Office can draw from in shaping final regulations.

V. The Small Webcaster Settlement Act of 2002

On December 4, 2002, the President signed into law the Small Webcaster Settlement Act of 2002, Public Law 107–321, 116 Stat. 2780, which permitted SoundExchange to enter into agreements on behalf of all copyright owners and performers to set rates, terms, and conditions for noncommercial and small commercial webcasters operating under the section 112 and 114 statutory licenses. The Act directs the Copyright Office to publish such agreements in the **Federal Register** and specifies that they may not be taken into account by the Office in formulating notice and recordkeeping provisions under the statutory licenses.

On December 24, 2002, the Copyright Office published the agreement for small commercial webcasters. 67 FR 78510 (December 24, 2002). That agreement specifies the types of data that must be reported by small commercial webcasters for the years 2003 and 2004. The agreement further provides, however, that

> [f]or calendar years 2003 and 2004, details of the means by which copyright owners may receive notice of the use of their sound recordings, and details of the requirements under which reports of use concerning the matters identified in Section 6(a) [8] shall be made available, shall be as provided in regulations issued by the Librarian of Congress under 17 U.S.C. 114(f)(4)(A).

Id. at 78512. Consequently, entities which are signatories to the agreement published on December 24, 2002, while not bound by the records of use provisions of these interim regulations, are bound by the interim notice regulations adopted herein.

On June 11, 2003, the Office published the agreement for noncommercial webcasters. 68 FR 35008 (June 11, 2003). That agreement provides that for 2003 and 2004, noncommercial webcasters are not required to provide any reports of use of sound recordings "even if the Librarian of Congress issues regulations otherwise requiring such reports by Noncommercial Webcasters." *Id.* at 35011. Consequently, those entities that are signatories to the agreement published on June 11 are not bound by the records of use regulations announced in this notice for the years 2003–2004. These entities are still bound, however, by the notice provisions adopted today.

VI. Parties Affected

The Copyright Office announced in the NPRM that it intended to adopt a single set of notice and recordkeeping regulations for all four categories of services: Preexisting subscription services, preexisting satellite digital audio radio services, nonsubscription services, and new subscription services. 67 FR 5761, 5762 (February 7, 2002). The Office has been requested, however, to exclude preexisting subscription services and preexisting satellite digital audio radio services from this proceeding.

With respect to preexisting subscription services, the Recording Industry Association of America ("RIAA") recommended in its petition that opened this rulemaking that preexisting subscription services be allowed to continue to operate under the rules set forth in former 37 CFR 201.36. RIAA petition at 1–2. Support for the proposal was echoed by the preexisting subscription services. Comments of Music Choice at 6 (submitted April 5, 2002); Comments of Music Choice at 1–2 (submitted September 30, 2002). Because copyright owners and preexisting subscription services appear content to operate under the existing recordkeeping provisions contained in former § 201.36 at this time,[9] the recordkeeping interim

[6] As discussed below, these interim regulations make some modifications to the requirements announced in the September 23, 2002, **Federal Register** document.

[7] The Office has also had discussions with copyright owners and users regarding the format in which records of use should be preserved, including a public meeting on October 8, 2002. See 67 FR 59547 (September 23, 2002). These discussions further underscored the difficulty of prescribing detailed electronic format and delivery requirements and have prevented including them in today's interim regulations. These requirements will be announced in a future **Federal Register** document.

[8] Section 6(a) of the agreement contains the details of the records of use that must be kept.

[9] On March 14, 2003, the Copyright Office received a joint petition from copyright owners and performers and preexisting subscription services to conduct an expedited rulemaking to modify the provisions of former § 201.36. The sought-after modifications, negotiated during the statutorily prescribed negotiation period for adjustment of rates and terms, would supercede the existing

Continued

regulations announced today will not apply to preexisting subscription services. Likewise, the notice provisions of § 270.1 (former § 201.35) announced today do not apply to preexisting subscription services.

On April 11, 2003, the Office received a petition from SoundExchange, XM Satellite Radio, Inc., Sirius Satellite Radio Inc., the American Federation of Radio and Television Artists, and the American Federation of Musicians stating that these entities had reached an agreement regarding notice and recordkeeping requirements for the period through December 31, 2006, and requesting that the Office defer adopting notice and recordkeeping regulations for preexisting satellite digital audio radio services at this time. The Office responded by letter dated May 8, 2003, denying the petition because "it is the Library's responsibility, and the Library's responsibility alone, to promulgate rules establishing notice and record-keeping requirements." Copyright Office letter at 1 (May 8, 2003). We concluded that it is "our duty to include provisions governing preexisting satellite digital audio radio services in the section 114 and section 112 notice and recordkeeping regulations that we are preparing for publication." *Id.* at 2. Although the parties to the agreement relating to preexisting satellite digital audio radio services could have requested that the Office adopt the notice and recordkeeping requirements they had negotiated, they did not do so. Indeed, the Office has no knowledge of the details of those negotiated requirements. Consequently, the interim regulations announced today apply to preexisting satellite digital audio radio services, as well as nonsubscription services, business establishment services and new subscription services. Presumably, however, no copyright owner who is a party to the negotiated agreement would be in a position to complain of the failure, by a service that is also a party to the agreement, to comply with the regulations announced today.

VII. Scope of the Reporting Requirements

In announcing today's required records of use on a prospective basis, it must be emphasized that they represent the minimum requirements. The Office recognizes that adopting detailed, comprehensive reporting requirements at this time could place a considerable burden on those services which have not yet developed methods for maintaining records of sound recording use. The prudent course therefore is to set forth minimum requirements for records that must be maintained, as well as the frequency with which they must be kept. It is highly likely that additional requirements will be set forth after the Office has determined the effectiveness of these interim rules.

VIII. The Proposals of the Commenters

A. Proposal of the Recording Industry Association of America

The Recording Industry Association of America ("RIAA") [10] recommended that the Copyright Office require that services report to SoundExchange a comprehensive amount of data which it asserted was necessary for proper distribution of royalties under the section 112 and 114 statutory licenses. These requirements were set forth in the NPRM and are discussed there. See 67 FR 5761 (February 7, 2002). Subsequent to the NPRM, and due at least in part to concerns expressed by users of the statutory licenses regarding the privacy of user information in a listener log, RIAA revised its proposal and dropped its request that the requirements include a separate play list and listener log. Comments of RIAA at 33 (submitted April 5, 2002). RIAA submits that all the data elements it has requested for records of use are essential to the accurate and prompt identification of the ownership of each sound recording performed and to the efficient distribution of royalties. The more data that services using the statutory licenses submit, the more "pieces to the puzzle" there are for a correct royalty distribution. *Id.* at 39.

RIAA's proposed records of use are divided into three principal parts: (1) Information identifying the licensee as well as the type of service and programming offered by the licensee; (2) information regarding the digital audio transmissions of sound recordings; and (3) information regarding the specific sound recordings transmitted to the public.

1, *Data Identifying Service, Type of Service and Programming Offered.* RIAA proposes adoption of six different data fields for this category: (1) Service Name; (2) Transmission Category; (3) Channel or Program Name; (4) Type of Program; (5) Influence Indicator; and (6) Genre.

a. *Service Name.* The Service Name identifies the service reporting the use of a particular sound recording.

b. *Transmission Category.* The Transmission Category identifies the royalty structure for sections 112 and 114 that a service uses to calculate its royalty obligation. Because there are essentially many licenses within section 112 and section 114 (*e.g.*, a section 114 license for preexisting subscription services with one royalty rate, a section 114 license for nonsubscription services with different royalty rates), the Transmission Category is necessary to determine the royalty fee that is being paid for the particular use of a sound recording. RIAA offers ten category codes that identify each type of service using the section 112 and 114 licenses. *Id.* at 48–49.

c. *Channel or Program Name.* RIAA asserts that the Channel or Program Name is necessary to verify compliance with the sound recording performance complement set forth in 17 U.S.C. 114(j)(13). *Id.* at 49. SoundExchange also requests identification of the Channel or Program Name, but for purposes of royalty distribution. SoundExchange acknowledges that certain services lack the capacity to identify the number of performances (*i.e.*, the number of listeners) of a particular sound recording and recommends that those services report the number of Aggregate Tuning Hours ("ATH") to a particular channel. However, in order for ATH to provide SoundExchange with meaningful distribution data, the service must report the Channel or Program Name to avoid under-valuing or over-valuing specific sound recordings. For example, if a service has two channels of programming that perform two different genres of music (one that has many listeners and one that does not), yet reports the same ATH for the two channels, the sound recordings on both channels will be valued equally even though the one channel received more listenership. However, if separate ATH are reported for each channel, the higher ATH for the more popular channel will be reflected and the sound recordings on that channel will receive a more accurate royalty distribution. Comments of SoundExchange at 17 n.6 (submitted September 30, 2002); Letter from SoundExchange to Copyright Office explaining footnote 6 (submitted October 28, 2002).

RIAA asserts that the Channel Name for an AM or FM radio station should be the Federal Communications Commission ("FCC") facility identification number of the broadcast

recordkeeping provisions in former § 201.36. The petition will be addressed in a separate **Federal Register** document.

[10] RIAA's comments also include the views of SoundExchange which, at the time of submission of the initial comments, was an unincorporated division of RIAA. Comments of RIAA at 1 (submitted April 5, 2002).

station that is transmitted and the frequency band designation (ex. WABC–AM). The Channel Name for all other transmissions should be the service's name for such channel (ex. "American Top 40," "80's Rock") "provided that if a program is generated as a random list of sound recordings from a predetermined list, the channel or program must be a unique identifier differentiating each user's randomized playlist from all other users' randomized playlists." Comments of RIAA at 49–50 (submitted April 5, 2002) quoting the NPRM, 67 FR at 5766.

d. *Type of Program.* Identification of the Program Type "is needed to ensure compliance with certain statutory provisions that establish duration requirements for particular programming." *Id.* at 50. RIAA proposes four categories for Type of Program: archived programs, looped programs, prescheduled programs and a category for all other programs. *Id.*

e. *Influence Indicator.* RIAA asserts that:

> The Influence Indicator field is needed because certain services provide the user with an ability to skip forward through a play list at the user's sole discretion. Although RIAA believes that the use of a "skip" feature may render certain services interactive and, therefore, ineligible for the statutory license, a limited skip feature may eventually be determined to be eligible for the statutory license. If such services are determined to be eligible for the statutory license subject to certain conditions, then copyright owners will need to know which services offer a skip feature and whether those required conditions are satisfied.

Id. at 51. RIAA proposes two categories for the Influence Indicator: non-user influenced and user influenced.

f. *Genre.* The Genre field provides assistance in distinguishing among sound recording copyright owners with the same name that own different repertoire. The Genre field would apply to the designation that a service gives to a particular channel (ex. Rock, Classical) not to a particular sound recording. *Id.* at 51–52.

2. *Data Regarding the Transmissions of Sound Recordings.* RIAA proposes two categories of information regarding the transmissions of sound recordings: (1) Start Date and Time of the Sound Recording's Transmission; and (2) Total Number of Performances.

a. *Start Date and Time of the Sound Recording's Transmission.* RIAA asserts that this information is necessary to assure that services are complying with the sound recording performance complement. It also asserts that the information is necessary because members of SoundExchange may "decide to weight performances based upon the time of day that the transmission is made, with performances during the day being weighted more heavily than overnight performances." *Id.* at 52.

b. *Total Number of Performances.* RIAA asserts that Total Number of Performances is critical to distributing royalties collected under the section 114 license. Since the royalties paid by services under the license are on a per performance basis, see 67 FR 45240, 45272 (July 8, 2002), the services already have this information; and it is essential to the distribution mechanism mandated by the Librarian for non-SoundExchange members. *See* 37 CFR 261.4.

3. *Data for Identifying Each Sound Recording.* RIAA proposes ten categories of information for the identification of each sound recording: (1) Artist Name; (2) Sound Recording Title; (3) Album Title; (4) International Standard Recording Code ("ISRC"); (5) Track Label (P) Line; (6) Duration of Sound Recording; (7) Marketing Label; (8) Catalog Number; (9) Universal Product Code; and (10) Release Year.

a. *Artist Name* and b. *Sound Recording Title*

RIAA asserts that these two elements are the most basic information necessary to identify a sound recording and must be reported in all instances. Comments of RIAA at 55 (submitted April 5, 2002).

c. *Album Title.* RIAA asserts that Album Title is necessary to assist in differentiating a song by a particular artist that appears on more than one record album where the copyright owners of the album are different. For example, the Alice Cooper sound recording "I'm 18" appears on both the "Classicks" and "Love it to Death" record albums. Epic Records is the owner of the "Classicks" album, while Warner Bros. is the owner of the "Love it to Death" album. If the Designated Agents distributing royalties do not know from which album the service performed "I'm 18," they cannot properly distribute royalties. Reply comments of RIAA at 57–58 (submitted April 26, 2002).

d. *International Standard Recording Code ("ISRC").* The International Standard Recording Code ("ISRC") is a unique code that is embedded in many sound recordings released in recent years and is capable of being read with the proper computer software. Because ISRC is unique to each sound recording that possesses it, it is extremely useful in specifically identifying a particular sound recording. Comments of RIAA at 56–57.

e. *Track Label (P) Line.* The Track Label (P) Line is the copyright owner information for an individual sound recording. According to RIAA, a Track Label (P) Line can be found on the backside of the label packaging after the (P) Line symbol. If the album is a compilation, the Track Label (P) Line information can be found inside the label package insert following the listing of each sound recording. *Id.* at 57. The copyright owner listed in the Track Label (P) Line is generally the entity entitled to royalties for the public performance of the sound recording, but is not the complete information necessary to distribute royalties under the section 112 and 114 licenses. *Id.*; Reply comments of RIAA at 63–64.

f. *Duration of Sound Recording.* Duration of the Sound Recording is the total recorded time of that sound recording as identified on the label packaging for that version of the musical work, regardless of the time that it takes the service to transmit the sound recording. RIAA asserts that this information is necessary to help distinguish among remixes of the same sound recording by the same artist. Comments of RIAA at 57–58 (submitted April 5, 2002).

g. *Marketing Label.* The Marketing Label is the name of the company that markets the album on which a particular sound recording may be found. RIAA states that often, but not always, the company name on the Track Label (P) Line will be the same as the Marketing Label; hence both data fields must be provided. *Id.* at 58.

h. *Catalog Number.* The Catalog Number is the unique number assigned by a particular record label to an album, as opposed to the particular sound recording on the album, for purposes of ordering and inventory management. RIAA asserts that services should provide this information because it is required in the Copyright Office regulations for preexisting subscription services. *See* 63 FR 34289, 34297 (June 24, 1998).

i. *Universal Product Code ("UPC").* The Universal Product Code ("UPC") is a 12-digit numeric identification code that is placed on products intended for retail sale and is read by automated scanning devices (*i.e.* the "bar code" number). Unlike an ISRC, which is unique to a sound recording, a UPC is unique to a particular product (*i.e.* CD, cassette, LP). RIAA asserts that the UPC is necessary to assist in correctly identifying the origin of a sound recording. Comments of RIAA at 58–59 (submitted April 5, 2002).

j. *Release Year.* The Release Year is the year the album was first released

commercially for public distribution as identified on the backside of the label packaging after the (P) Line symbol. Again, RIAA asserts that Release Year is necessary to correctly identify the origin of a sound recording. *Id.* at 59.

B. Proposal of the American Federation of Musicians and the American Federation of Televison and Radio Artists

The American Federation of Musicians ("AFM") and the American Federation of Television and Radio Artists ("AFTRA") endorse the proposal of RIAA for records of use data

> because those rules appear to require records of use that are adequate to fulfill the important Congressional objective of compensating each featured recording artist for use of his or her unique sound recordings, and * * * will further assist in fulfilling the equally important Congressional purpose of also compensating non-featured recording artists who have performed on sound recordings used by the services.

Joint comments of AFM/AFTRA at 2 (submitted April 5, 2002). However, AFM/AFTRA urge that the Copyright Office require an additional data field that requires services to enter the names of all non-featured singers and musicians on each sound recording when the services are in possession of that information. They assert that this information is essential to distribute the modest amount of royalties allocated to non-featured singers and musicians under the section 114 license. If the burden to obtain this information is placed upon the administrator of these royalties, the costs associated with obtaining it will exceed the royalties. *Id.* at 16–20.

C. The Services' Proposals

Not surprisingly, the services using the section 112 and 114 statutory licenses vehemently object to the amount and character of information sought by RIAA and SoundExchange. Some assert that much of the information sought is not generally available and that the cost of providing it will drive certain services out of business. There is no unanimity among the services as to what information can be provided, although they certainly all prefer to provide less rather than more.

1. *Proposals of Broadcasters.* Bonneville International Corporation, Clear Channel Communications, Cox Radio, Inc., National Association of Broadcasters, Susquehanna Radio Corporation, National Religious Broadcasters Music License Committee and Salem Communications Corporation (collectively "Radio Broadcasters") argue that RIAA and SoundExchange have the burden of proving why each element of requested data is necessary for the collection and distribution of royalties, a burden which they assert that RIAA and SoundExchange have failed to meet. Comments of Radio Broadcasters at 2 (submitted April 5, 2002). They also submit that the Copyright Office should only require information necessary to identify a sound recording for purposes of royalty distribution and should not require information that enables RIAA to monitor the sound recording complement requirements of section 114. *Id.* at 17–21. Smaller broadcasters charge that RIAA and SoundExchange are seeking data that they know smaller broadcasters cannot possibly supply. Comments of Collegiate Broadcasters at 2–3 (submitted April 5, 2002); Comments of National Federation of Community Broadcasters at 3 (submitted April 5, 2002); Comments of Harvard Radio Broadcasting Company at 8 (submitted April 5, 2002).

Indeed, smaller broadcasters—in particular noncommercial broadcasters—request that the Copyright Office exempt them from any record of use reporting requirements. Comments of College Broadcasters at 1–2 (submitted April 5, 2002); Comments of Collegiate Broadcasters at 3–4 (submitted April 5, 2002); Comments of Harvard Radio Broadcasting Company at 2 (submitted April 5, 2002); Comments of Intercollegiate Broadcasting System at 1 (submitted April 5, 2002); Comments of Mayflower Hill Broadcasting Company at 2 (submitted April 5, 2002); Comments of National Federation of Community Broadcasters at 3 (submitted April 5, 2002); Comments of WOBC at 2 (submitted April 5, 2002); Comments of Adventist Radio Broadcasters Association at 4 (submitted April 5, 2002). These commenters note that they possess neither the manpower nor the financial resources to assemble and enter the data requested by RIAA. Many of these stations depend upon volunteer help that cannot be required to undertake the task of preparing such detailed reports of use. Their general recommendation is that radio stations with ten or fewer paid employees be fully exempted from reporting records of use. See, e.g. Comments of National Federation of Community Broadcasters at 5 (submitted April 5, 2002); Reply Comments of Radio Broadcasters at 35 (submitted April 26, 2002); Comments of College Broadcasters at 22 (submitted April 5, 2002).

Radio Broadcasters submit that only five data fields should be required for records of use: (1) Name of the service; (2) sound recording title; (3) name of artist; (4) call sign of the station or channel; and (5) date of transmission. Comments of Radio Broadcasters at 41 (submitted April 5, 2002). They contend that while this information may not enable SoundExchange to identify every entity entitled to a distribution royalty every time, such perfection is not required because the law requires only "reasonable" notification of use. *Id.* Radio Broadcasters, as well as other services, contend that they cannot supply the additional fields of data requested by RIAA because, in many instances, they are not supplied with the information from the record label. This is particularly the case with new releases where the service receives a promotional sound recording which has yet to be placed on an album, receive an ISRC, UPC, catalog number, Track Label (P) Line, etc. Even if this information is received at a later date or can be later determined, it is unreasonably burdensome to require services to seek it out and report it. Comments of Radio Broadcasters at 44–54 (submitted April 5, 2002); Comments of beethoven.com at passim (submitted April 5, 2002).

Radio Broadcasters also indicate that there are special reporting difficulties associated with musical programming obtained from third-party syndicators. These syndicators provide little if any information regarding the sound recordings that they perform. Requiring the broadcaster of this programming to track down the information would be unduly burdensome. Comments of Radio Broadcasters at 31–33 (submitted April 5, 2002). A similar problem also exists for programming which is broadcast live or in a "free flow" fashion. Comments of Harvard Radio Broadcasting Company at 7 (submitted April 5, 2002).

2. *Proposals of Non-broadcaster Services.* Non-broadcaster services (*i.e.*, webcasters) are generally prepared to provide more data than broadcasters although certainly well short of RIAA's requests. For example, David Landis, founder of Ultimate 80's, states that he has "spoken with many of my fellow webcasters" and can provide the following data: (1) The name of the service; (2) the channel of the program; (3) the type of the program (archived, looped or live); (4) the date of the transmission; (5) the time of the transmission; (6) the time zone of the origination of the transmission; (7) the duration of the transmission (to the nearest second); (8) the sound recording title; (9) the featured recording artist; and (10) the musical genre of the channel or program (*i.e.* the station format). Comments of Ultimate 80's at 4 (submitted April 5, 2002).

Beethoven.com proposes the same requirements, with the exception of providing data on the duration of the transmission of a sound recording. Comments of Beethoven.com at 5 (submitted April 5, 2002).

Websound, Inc. recommends an even more extensive list of requirements. It states that it can supply: (1) The name of the service; (2) the channel or program, or in the case of transmission of an AM or FM signal, the station identifier including the band designation and the FCC facility identification number; (3) the type of program (archived, looped or live); (4) the date of transmission (except for archived programs); (5) the time of transmission (except for archived programs); (6) the time zone from which the transmission originated; (7) for archived programs, the numeric designation of the pace of the sound recording within the order of the program; (8) the duration of the transmission (to the nearest second); (9) the sound recording title; (10) the ISRC, where available; (11) the release year identified in the copyright notice on the album and, in the case of compilation albums created for commercial purposes, the release year identified in the copyright notice for the individual track; (12) the featured recording artist; (13) the album title or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the service for purchase of the sound recording; (14) the marketing label; (15) the UPC; (16) the catalog number; (17) the Track Label (P) Line; (18) the musical genre of the channel or program, or in the case of the transmission of an AM or FM station, the broadcast station format. Comments of Websound, Inc. at 1–2 (submitted April 5, 2002).

Yahoo, Inc. submits that the Copyright Office should adopt only minimal reporting requirements for webcasting and broadcast retransmissions that would include the call letters of the AM or FM station, the format of the station or program (music or talk), the genre of the station or program and the cumulative number of listening hours to each station during the reporting period. Reply comments of Yahoo at 4, 10 (submitted April 26, 2002).

The Digital Media Association ("DiMA") argues that much of the information sought by RIAA and SoundExchange is redundant and should not be required. It suggests that services should be able to choose the data fields that they supply provided that the information is sufficient to identify the sound recording used. For example, DiMA asserts that any one of the following groups of information is, by itself, sufficient to identify a sound recording:

(1) Sound recording title, featured recording artist, group, or orchestra, the retail album title, and the Track Label (P) Line;
(2) Sound recording title, UPC and the Track Label (P) Line;
(3) ISRC and the Track Label (P) Line.

Comments of DiMA at 4 (submitted April 5, 2002).

Like Radio Broadcasters, DiMA argues that information sought by RIAA to monitor the sound recording complement of section 114 should be outside the scope of records of use requirements. *Id.* at 5; see, also Reply comments of Yahoo, Inc. at 2 (submitted April 26, 2002). And with regards to reporting requirements for programming provided by third parties, DiMA submits that existing third-party contracts should be grandfathered from reporting. *Id.* at 7.

IX. Required Records of Use

A. Consideration of the Comments

Deciding which data fields should be required for a record of use under the section 114 license presents a difficult challenge for the Copyright Office. There are many interests which must be considered and balanced. On the one hand, there must be sufficient information reported so as to accurately identify the sound recordings performed. This is necessary so that royalties may be paid to the proper parties and to avoid not compensating a large number of performances simply because there was insufficient information. On the other hand, the burdens associated with reporting information cannot be so high as to be unreasonable or to create a situation where many services cannot comply.

It has been asserted by some services throughout this docket that for some services any reporting of information regarding performances will be too great a burden. While this assertion, if true, might result in certain services ceasing operation under the statutory licenses, it is not a valid reason to eliminate reporting altogether. The law states that the Librarian of Congress must adopt regulations under the section 114 license to provide copyright owners of sound recordings with "reasonable notice" of the use of their sound recordings. 17 U.S.C. 114(f)(4)(A).[11] No provision is made for not adopting regulations in certain circumstances, or for exempting certain services from any reporting information. As discussed above, certain services—in particular noncommercial broadcasters—seek a complete exemption from reporting any data. Others are willing to report data for the sound recordings they perform themselves, but seek an exemption for sound recordings they receive from third-party syndicators. We find no authority in the statute to create such exemptions, nor do we find such exemptions as constituting "reasonable notice" of the performance of sound recordings.[12] In order to avail oneself of the statutory licenses, one must report some information. The question is how extensive that information should be.

In principle, one might imagine that recordkeeping for many webcasters could be a simple matter. Webcasting necessarily requires use of computers for storage and transmission of the performances of sound recordings. Thus, webcasters might be expected to have the requisite resources and sophistication to maintain and transmit detailed reports identifying each and every sound recording they transmit, as well as the number of performances transmitted.

If webcasters have the sophistication and equipment to facilitate the recordation and reporting of information, the webcasting statutory license could offer an opportunity to ensure that each copyright owner of each sound recording performed by webcasters will be compensated for exactly his or her share of the royalties generated by the statutory license. Because SoundExchange could, in theory, obtain perfect information about the number of performances of each sound recording, it could divide the total royalty pool by the total number of performances of all sound recordings, and then allocate to each sound recording the corresponding share based on the number of times it is performed.

However, many webcasters assert that the burden of keeping comprehensive

[11] A similar provision exists for use of the section 112 license. See 17 U.S.C. 112(e)(4).

[12] One could argue that reporting the use of sound recordings is not "reasonable" if a service cannot under any circumstances provide information about the sound recordings. Even if the Office were persuaded that some services cannot report any data—which we are not—the argument would be unpersuasive. Transmitting a sound recording to the public is not something that accidentally or unknowingly happens. It takes a significant amount of decision making and action to select and compile sound recordings, and a significant amount of technical expertise to make the transmissions. It is not unreasonable to require those engaged in such a sophisticated activity to collect and report a limited amount of data regarding others' property which they are using for their benefit. While making and reporting a record of use is undoubtedly an additional cost of transmitting sound recordings to the public, it is not an unreasonable one.

records would drive them out of business. *See, e.g.*, Reply Comments of a United Group of Webcasters at 3; Comments of Mayflower Hill Broadcasting Corp. at 1–2; Comments of Collegiate Broadcasters, Inc. at 2–3; Reply Comment of Harvard Radio Broadcasting Company at 6–7. We recognize that there will be some burden involved in reporting information on each sound recording performed, and as more information is required for each sound recording, the burden becomes greater. Although the ultimate goal is to require comprehensive reporting on each performance a webcaster makes, that goal is not achievable at this time. Therefore, the regulations announced today will not require year-round reporting, but only reporting for certain periods during the year, and the information that webcasters must provide will be less comprehensive than copyright owners desire.

In selecting the data fields described below, the Copyright Office was guided by several principles. First, we have not adopted any data fields proposed by RIAA which are not for the purpose of making royalty distributions under the section 112 and 114 licenses. RIAA has requested data for purposes of monitoring the sound recording performance complement in 17 U.S.C. 114(j)(13) (Start Date and Time of the Sound Recording's Transmission),[13] for monitoring requirements regarding the duration of programming 17 U.S.C. 114(d)(2)(C)(iii) (Type of Program), and to assist in determining whether a service is interactive (Influence Indicator). RIAA points to the Copyright Office's decision in the preexisting subscription service rulemaking to adopt reporting requirements designed to permit monitoring of the sound recording performance complement, 63 FR 34289 (June 24, 1998), and argues that the decision must be applied in this docket. Reply Comments of RIAA at 15 (submitted April 26, 2002). In that rulemaking proceeding we said:

> The Office considered arguments of DCR and other Services that the Act imposes no obligation to affirmatively report compliance with the complement, but reaffirms its earlier judgment. The Office notes that conforming to the performance complement is a condition of the statutory license, and a Service that complies with the regulatory notice requirements and pays the statutory royalties thereby avoids infringing the copyright owners' exclusive rights. 17 U.S.C. 114(d)(2), (f)(5). The Office determines, therefore, that it is within its rulemaking authority under section 114(f)(2) to require reporting of complement information. See *Cablevision Sys. Devel. Corp.* v. *Motion Picture Ass'n*, 836 F.2d 599 (D.C. Cir. 1988) (Copyright Office had authority to issue regulations interpreting statute). The Office believes that the presence and specificity of the performance complement indicates Congress' intent that records of use include data to test compliance. While section 114(j)(7) provides that transmissions from multiple phonorecords exceeding the performance complement's numerical limitations will nonetheless conform to the complement if the programming of multiple phonorecords was not "willfully intended" to avoid the numerical limitations, a pattern of conduct might provide evidence of the requisite intent.
>
> 63 FR at 34294.

The reasoning for requiring performance complement data in the preexisting subscription service rulemaking does not necessarily apply with the same force to these interim regulations. While there is evidence of legislative intent for services to report performance complement data, as well as other data related to compliance with the terms of the license, such data is not useful when it is limited to only two weeks per calendar quarter. See discussion of reporting periods, *infra*. Given that reporting of such limited data will not serve the purpose of monitoring statutory compliance and given the burden upon services for reporting the data, we are not requiring it at this time. The matter may be further addressed in the final regulations in this docket.

The second principle guiding our selection of data fields is a cost/benefit analysis. The Office has chosen to adopt interim regulations at this time to afford services an ample period of time to adjust to the process of reporting. It is evident from the statements made by certain services at the meetings held by the Office in this docket that in many cases up to now little or no gathering of data has taken place. Given this notable lack of activity, imposition of extensive and detailed reporting requirements at this time could increase the instances of noncompliance by services unprepared to report data and could substantially raise the reporting error rates for services that do fully comply. Consequently, the Office has chosen to require a minimal level of reporting at this time that will permit the distribution of royalties (albeit imperfectly). These baseline requirements will be revisited in the final regulations after the Copyright Office has had sufficient time to assess their effectiveness and consider ways in which data reporting may be improved.[14]

By applying these principles to the 18 data fields requested by RIAA and the fields requested by AFM and AFTRA, the Copyright Office has settled upon the fields which must be reported by services using the section 112 and 114 statutory licenses. With respect to RIAA's requests, we are not requiring Start Date and Time of the Sound Recording's Transmission, Type of Program and Influence Indicator because these data fields are for purposes of monitoring compliance with the limitations of the section 114 license. As discussed above, requiring these fields would be unnecessarily burdensome especially in light of the fact that the two-week-per-calendar-quarter reporting requirement renders the information collected from these fields of little or no value in enforcing the requirements of the section 114 license.

The Office also has not chosen to require reporting of the Track Label (P) Line, the Duration of the Sound Recording, the Catalog Number, the UPC and the Release Year, the reporting of which would be unduly burdensome at this time. As Radio Broadcasters stated in their comments, these pieces of information are frequently not provided to services until well after the initial transmissions of the sound recordings. While the information is discoverable at a later date, researching it and revising prior records of use would involve significant costs.

Finally, we are not adopting the proposal of AFM and AFTRA to report data regarding nonfeatured vocalists and musicians. Many sound recordings have numerous nonfeatured musicians and vocalists which would require large amounts of data entry into a report of use. Entering lists of names of performers into a report of use would be a prohibitively costly undertaking for services that would raise the likelihood of noncompliance and error rates in reporting. Furthermore, we are focused upon identifying and reporting the use of sound recordings, not performers associated with the sound recordings. AFM and AFTRA's proposal is not consistent with the goal of this interim

[13] RIAA also states that it may use data regarding the Start Date and Time of the Sound Recording's Transmission for distribution purposes when audience size is not reported. Comments of RIAA at 52 (submitted April 5, 2002). Reporting of the number of performances of a sound recording is discussed *infra*, and data regarding the Start Date and Time of the Sound Recording's Transmission is not necessary.

[14] While the data fields required by these interim regulations are the baseline requirements, there is no prohibition on services reporting additional data. As discussed above, webcaster services appear capable of providing more data than broadcaster services. Delivery of additional data is encouraged, and services wishing to do so should contact SoundExchange to make arrangements for providing the additional information.

regulation to establish merely baseline reporting requirements and cannot be adopted at this time.

B. The Record of Use Reporting Regime

In this section the Copyright Office sets forth the reporting regime for the use of sound recordings under the section 112 and 114 statutory licenses.[15] In the interest of regulatory flexibility and providing services with the opportunity to reduce their reporting burden, we are prescribing a reporting regime that, in two instances, permits the entry of a single amount of data in lieu of additional separate categories of data identifying the sound recording and its use. The reporting regime is as follows:

1. Name of Service
2. Transmission Category
3. Featured Artist
4. Sound Recording Title
5. Sound Recording Identification
   Album Title
   Marketing Label
   OR
   International Standard Recording Code (ISRC)
6. Total Performances
   Aggregate Tuning Hours
   Channel or Program Name
   Play Frequency
   OR
   Actual Total Performances

Under this reporting regime, a service may report as few as six items of data per sound recording or as many as eight depending upon the amount of reporting data available to each service. A service that has ISRC data and Actual Total Performances data for a sound recording need only report its Name, the Transmission Category, the Featured Artist, the Sound Recording Title, ISRC, and Actual Total Performances for the sound recording.[16] A service which has the ISRC but not the Actual Total Performances data, may report the ISRC and in addition must report its Name, Transmission Category, Featured Artist, Sound Recording Title, Aggregate Tuning Hours, Channel or Program Name, and Play Frequency. Likewise, a service which has Actual Total Performances data but not ISRC may report Actual Total Performances and then must report its Name, Transmission Category, Featured Artist, Sound Recording Title, Album Title, and Marketing Label. And a service which has neither ISRC nor Actual Total Performances data for a sound recording must report its Name, Transmission Category, the Featured Artist, Sound Recording Title, Album Title, Marketing Label, Aggregate Tuning Hours, Channel or Program Name, and Play Frequency.

C. Details of the Data Fields for a Record of Use

1. *Name of Service.* The Name of Service is a mandatory reporting category. The Name of Service is the full legal name of the service making the transmissions.

2. *Transmission Category.* The Transmission Category is a mandatory reporting category. Because the various statutory licenses contained in section 114 have differing royalty structures, and because many services frequently operate under more than one license, it is necessary to identify the category under which the performance of a sound recording is made. Services shall use the following category codes to identify each sound recording performed:

Category code	Description
A	Eligible nonsubscription transmission other than broadcast simulcasts and transmissions of non-music programming.
B	Eligible nonsubscription transmission of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming.
C	Eligible nonsubscription transmission of non-music programming reasonably classified as news, talk, sports or business programming.
D	Eligible nonsubscription transmission by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by 37 CFR 261.3(a)(2)(i) and (ii).[17]
E	Eligible nonsubscription transmission by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by 37 CFR 261.3(a)(2)(iii).[18]
F	Eligible nonsubscription transmission by a small webcaster operating under an agreement published in the **Federal Register** pursuant to the Small Webcaster Settlement Act.
G	Eligible nonsubscription transmission by a noncommercial broadcaster operating under an agreement published in the **Federal Register** pursuant to the Small Webcaster Settlement Act.
H	Transmission other than broadcast simulcasts and transmissions of non-music programming made by an eligible new subscription service.
I	Transmission of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible new subscription service.
J	Transmission of non-music programming reasonably classified as news, talk, sports or business programming made by an eligible new subscription service.
K	Eligible transmission by a business establishment service making ephemeral recordings.

3. *Featured Artist.* The Featured Artist category is a mandatory reporting category for each sound recording. Each service must provide the name of the featured artist for each sound recording it transmits during the relevant reporting period. If the featured artist is an individual or an entity such as a band, the full name must be reported. In those instances where the songwriter and the featured artist are different, care must be taken in reporting only the featured artist. For example, if the sound recording is a performance of the Boston Philharmonic Orchestra of a

[15] As discussed, *infra*, the required data fields for a record of use under the section 114 license are the same for a record of use under the section 112 license. Services using both licenses only need report the required data fields once for each sound recording.

[16] Simply because a service has the ISRC and/or Actual Total Performances for a sound recording does not mean the service must report this data in lieu of the alternative categories. The purpose of reporting ISRC and/or Actual Total Performances is to reduce the categories of data that a service must report for each sound recording. If, for example, a service possesses the ISRC for a sound recording but prefers instead to report the Sound Recording Title, Album Title and Marketing Label instead, it is free to do so.

[17] Transmissions covered by these provisions include simultaneous Internet retransmissions by non-Corporation for Public Broadcasting noncommercial broadcasters of over-the-air AM or FM broadcasts by the same radio station and other Internet transmissions of non-Corporation for Public Broadcasting noncommercial broadcasters, including up to two side channels of programming consistent with the mission of the station, and are subject to a section 114 royalty of 0.02 cents per performance.

[18] Transmissions covered by this provision include Internet transmissions on other side channels of programming by non-Corporation for Public Broadcasting noncommercial broadcasters and are subject to a section 114 royalty of 0.07 cents per performance.

work by Mozart, the featured artist should be reported as the Boston Philharmonic Orchestra, not Mozart. Likewise, where the sound recording performed is taken from an album that contains various featured artists (*i.e.*, a compilation), it is not acceptable to report the artist as "Various." The featured artist of the particular sound recording track performed must be reported.

4. *Sound Recording Title.* As with the featured artist, care must be taken in accurately reporting the title of the sound recording (*i.e.*, the song title). It is not acceptable to report the name of the album from which the sound recording is taken.

5. *Sound Recording Identification:*

a. International Standard Recording Code (ISRC). The International Standard Recording Code ("ISRC") is the unique identifier that identifies each version of a sound recording. It is imbedded in promotional and commercially released sound recordings and can be read by currently available software. A service may report the ISRC of a sound recording in lieu of the Sound Recording Title, Album Title and Marketing Label. However, identification of the Featured Artist is still required. The purpose of this requirement is to permit verification of the correct ISRC by allowing SoundExchange to identify and correct reports where the Featured Artist does not match the information associated with the ISRC.

b. For those services that do not report the ISRC for a sound recording, the Album Title and Marketing Label must be reported.

(i) Album Title. According to the comments and the May 10, 2002, public meeting, the title of an album on which a particular sound recording appears may not be determined at the time the sound recording is released to broadcasters and webcasters for performance; or the album title information may not be supplied by the recording label. Consequently, services need only report the album title for a particular sound recording when they have that information in their possession, or it has been supplied by the recording label, at or before the time of performance of the sound recording.

Those services which copy sound recordings into databases for subsequent transmission to their users and do not enter the album title into that database are nonetheless responsible for providing the album title if that information was in their possession, or been supplied to them, at or before the time the sound recording was performed.

(ii) Marketing Label. The Marketing Label is the name of the company that markets the album which contains the sound recording. As with album titles, it is sometimes the case that services do not possess, or are not supplied with, the name of the marketing label for the sound recording. Services need only report the marketing label if that information was in their possession, or was supplied to them by the marketing label, at or before the time the performance of the sound recording is made. Discarding marketing label information, or not including it in the database into which the sound recording is copied, does not relieve the service of the obligation to report the information.

6. *Total Performances.* Services must provide the total number of performances of each sound recording during the relevant reporting period. Section 261.2, 37 CFR, defines a "performance" as:

> [E]ach instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (*e.g.* the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:
>
> (1) A performance of a sound recording that does not require a license (*e.g.* the sound recording is not copyrighted);
>
> (2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and
>
> (3) An incidental performance that both: (i) Makes no more than incidental use of sound recordings, including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and
>
> (ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

See, 69 FR 5693 (February 6, 2004).

Certain services argue that it is not possible, in many circumstances, to keep track of the number of performances of a sound recording. *See, e.g.* Comments of Harvard Broadcasting Radio Company at 2 (submitted September 30, 2002); Comments of NRBMLC and Salem Communications Corp. at 4 (submitted September 30, 2002); Comments of Collegiate Broadcasters, Inc. at 6–7 (submitted September 30, 2002). Obviously, repeated failures by multiple services to report the number of performances of a sound recording will subvert the purpose of the recordkeeping requirement in that many sound recordings will be under-compensated or not compensated at all from the section 114 and 112 royalties. The Copyright Office is therefore permitting services to identify the total number of performances of a sound recording during the reporting period in one of two ways: Actual Total Performances or Aggregate Tuning Hours, Channel or Program Name, and Play Frequency.

a. Actual Total Performances. For those services that possess the technological ability to identify accurately the number of times that a sound recording is performed (such as those that generate intended play lists), the number of performances must be reported in the performance data field. The data reported in this field may be for each time the sound recording is transmitted or "played" during the reporting period, or for all Actual Total Performances of the sound recording during the relevant reporting period.[19]

b. For those services that lack the technological ability to report the actual number of performances, or choose not to report such information, the Aggregate Tuning Hours, Channel or Program Name, and Play Frequency information must be reported for each sound recording.

(i) *Aggregate Tuning Hours.* Aggregate Tuning Hours ("ATH") are a standard measure of listenership that can be used to estimate the Actual Total Performances of sound recordings. Aggregate Tuning Hours measure the total number of listener hours by all who have accessed the service during a given period of time. According to certain broadcasters, ATH for AM/FM radio stations are readily calculable by a service. See Joint Reply Comments of Radio Broadcasters at 26 (submitted April 26, 2002).

Aggregate Tuning Hours do not, by themselves, provide sufficient information on which to estimate the Total Performances of a sound recording. However, when combined with information regarding the Channel or Program Name on which the sound recording appeared and the Play Frequency, Aggregate Tuning Hours will permit SoundExchange to estimate the Total Performances for a sound recording during the reporting period.

[19] If a service chooses to enter the Actual Total Performance data for each time the sound recording is transmitted or "played," it will be required to repeat the full data for the sound recording to account for all transmissions or "playings" of the sound recording during the relevant accounting period.

See Comments of SoundExchange, Inc. at 17 n.6 (submitted September 30, 2002). Services electing to report Aggregate Tuning Hours for a sound recording in lieu of the Actual Total Performances must report the Aggregate Tuning Hours for the two-week reporting period selected by the service for the channel or program on which the sound recording was performed. If the same sound recording was performed on more than one channel or program, a complete separate record of use must be reported for each channel or program. Under no circumstances may a service fail to report any data in the performance data field when submitting a record of use of a sound recording.

(ii) *Channel or Program Name.* The Channel Name for an AM or FM radio station should be the FCC facility identification number (*e.g.*, WABC–FM). For all other transmissions, the Channel or Program Name should be the name assigned by the service (*e.g.*, "Oldies Hits," "70's Rock"), "provided that if a program is generated as a random list of sound recordings from a predetermined list, the channel or program must be a unique identifier differentiating each user's randomized playlist from all other users' randomized playlists." 67 FR 5761, 5766 (February 7, 2002).

(iii) Play Frequency. Aggregate Tuning Hours and Channel or Program Name are not sufficient, by themselves, to permit an equitable distribution of royalties collected under the section 112 and 114 licenses. A sound recording which is played 100 times during the two-week reporting period is of greater value and should receive a larger distribution of royalties than a sound recording played only once during that same period. Consequently, it is necessary for services that elect not to report Actual Total Performances to report the number of times each sound recording is played during the two week reporting period.

Play Frequency is different than performance data. According to the definition of "performance" in 37 CFR 262.2, a sound recording is performed each time a listener receives at least some portion of the sound recording. A sound recording that is received in some part by 10 listeners constitutes 10 performances of that sound recording. In contrast, "played" simply means the overall number of times a sound recording is offered, regardless of the number of listeners receiving the sound recording. If a particular sound recording is offered to listeners on a particular channel or program only once during the two-week reporting period, then it is only "played" once and the Play Frequency is one. Likewise, if the sound recording is offered 10 times during the two-week reporting period, then it is "played" ten times and the Play Frequency is 10.

D. Required Data Fields for a Record of Use Under the Section 112 License

Section 112 of the Copyright Act contains a statutory license that permits services making digital audio transmissions to make ephemeral copies of sound recordings necessary to the transmission process. Some services operate under both section 114 and section 112 in transmitting sound recordings, while some do not make use of the section 114 licenses because their performances of sound recordings are exempted by the Copyright Act. See 17 U.S.C. 114(1)(C)(iv). These business establishment services, however, make ephemeral copies under the section 112 statutory license.

Section 112(e)(4) requires the Copyright Office to establish requirements by which copyright owners receive notice and records of use of the ephemeral copies of their sound recordings. The RIAA and SoundExchange, Inc. have requested that the Office require detailed records of each ephemeral copy of a sound recording made during the transmission of the performance. Comments of RIAA at 61–62 (submitted April 5, 2002); Comments of SoundExchange at Tab A, p. 11 (submitted September 30, 2002). Broadcasters counter that detailed reporting of the number of ephemeral copies made is unnecessary because of the direct link between the royalty fees paid by nonsubscription services for the section 114 license and the section 112 license; the ephemeral royalty rate for nonsubscription services is a percentage of the section 114 fee for performances. The number of ephemeral copies made is irrelevant because the value of those copies is tied to the value of the performance of the sound recording. Joint comments of Radio Broadcasters at 57–58 (submitted April 5, 2002). Furthermore, broadcasters assert that tracking the number of ephemeral copies made of a sound recording to facilitate its performance is a virtually impossible task and will result in a high error rate if reporting is required. *Id.* at 58.

It is reasonable to conclude that the value of a license to make ephemeral copies of a sound recording for the purpose of facilitating a transmission that results in a performance will depend upon the value of the performances of that sound recording. The Copyright Office is persuaded that records of performances of sound recordings are a sound proxy for the value of ephemeral copies made under the section 112 license. Our decision is bolstered by two factors. First, in the recent nonsubscription service CARP proceeding, RIAA advocated that the royalty fee for section 112 be a percentage of the section 114 fee, apparently recognizing the difficulty of assessing the independent value of ephemeral copies. RIAA's Proposed Findings of Fact and Conclusions of Law at ¶244 (submitted December 3, 2001). Second, while RIAA submits that SoundExchange may choose to distribute section 112 royalties on the basis of the number of copies, it may not do so. *See* 37 CFR 261.4(a) and (h).

For services that make transmissions under one or more of the section 114 licenses, there is no need to keep separate records for ephemeral copies made under section 112. Those services are required to submit only the single data file for performances of sound recordings and need not submit a second data file for ephemeral copies. However, even though the service is not required to report a separate data file, it must identify to the receiving and designated agents during each reporting period that it has made use of the section 112 license and that the data file it is submitting applies to both licenses.

For business establishment services that do not make use of the section 114 license but do make use of the section 112 license, performance data shall serve as the records of use for section 112. All the requirements prescribed by this regulation for the section 114 license records of use (data fields, formatting, delivery, etc.) apply to submission of section 112 records of use. Such services must identify to the receiving and designated agents for each reporting period that the data they are submitting is for the use of the section 112 license and not the section 114 license.

E. Sound Recordings Not Licensed Under Section 112/114

Many services, particularly those performing older works, transmit sound recordings that are not under federal copyright protection or whose term has expired. Also, many services may perform works that are in the public domain, or for which no copyright is claimed, or may directly license certain sound recordings from their owners. Services performing these works may report records of their usage but are not required to do so. Services are cautioned, however, that failure to report a sound recording which is under copyright protection may preclude reliance upon the section 114 and section 112 statutory licenses for the

performance and/or making of ephemeral copies of the work.

X. The Reporting Periods

As discussed above, the reporting requirements announced today are adopted on an interim basis while the Copyright Office continues the rulemaking process to produce final regulations. The interim regulations apply to performances on a prospective basis. It is anticipated that the Office will address the status of performances made prior to the effective date of these interim regulations at a later time. In the meantime, services should preserve those records of performances in their possession dating back to the effective date of the section 112 and 114 statutory licenses.

For the same reasons that the Office considers it advisable to phase in the reporting process, we have determined that, at this stage, it is best to require periodic reporting of sound recording performances rather than year-round census reporting. Once final regulations are implemented, year-round census reporting is likely to be the standard measure rather than the periodic reporting that will now be permitted on an interim basis.

For the period beginning with the effective date of this interim regulation until superseded by further regulations, services making use of the section 114 license (other than preexisting subscription services governed by 37 CFR 270.1, 270.2, and 270.4) and the section 112 license shall maintain records, as provided above, for each sound recording performed for a period of no less than two weeks (two periods of seven consecutive days) for each quarter of the calendar year.

The two weeks reported need not be consecutive, although a service may choose that option. Likewise, each week period need not begin on a Sunday, but may begin on any day of the week and then run for a total of seven consecutive days. The two weeks chosen for reporting should reflect as much as possible the programming typically offered by the service during the calendar quarter. Services that wish to report records of use for periods beyond the two weeks of each calendar quarter are encouraged to consult with SoundExchange on the feasibility of doing so and, if SoundExchange concurs, to report for longer periods of time.

The first reporting period shall begin on April 1, 2004,[20] which will mark the first period under these regulations that reports of use must be made. Reports of use thereafter will be due for each calendar quarter as described above until this interim regulation is superceded by final regulations.

A separate report of use is required for each calendar quarter for each statutory license used by the service.

XI. Notification of Use of the Statutory Licenses

The Copyright Office proposed in the NPRM certain amendments to the regulations contained in former 37 CFR 201.35 governing notice of use of statutory licenses. Unlike records of use, there is agreement on some of the proposed changes offered in the NPRM. Commenters agree that the Office should prescribe a single standard form for both the section 112 and 114 licenses and generally agree to the prototype form currently posted on the Copyright Office Web site at: *http://www.loc.gov/copyright/forms/form112-114nou.pdf. See, e.g.* Comments RIAA at 17–19 (submitted April 5, 2002); Joint Reply of Radio Broadcasters at 32–34 (submitted April 26, 2002). With respect to the form, RIAA requests that the services be identified in the exact manner in which they appear in the statute (*e.g.* "Eligible non-subscription transmission service" as opposed to "Non-subscription transmission service"), whereas broadcasters request "plain English" descriptions of the various services identified in the form. Joint Reply of Radio Broadcasters at 33 (submitted April 26, 2002); Comments of Collegiate Broadcasters at 5–6 (submitted April 5, 2002). We are accepting RIAA's suggestion to conform the definitions. While broadcasters' suggestion for "plain English" sounds reasonable in theory, it is a considerable challenge to craft definitions that are sufficiently colloquial to satisfy the goal of "plain English," yet remain technically accurate. Unfortunately, broadcasters did not provide any language for the Office to consider, and we therefore are not adopting their suggestion.

Commenters also agree that new notices of intent to use the licenses should be filed to update information from previously submitted notices and that notices should be maintained in a public file at the Copyright Office. Broadcasters, however, request that if new notices are required to be filed, the $20 filing fee be waived for those who have previously submitted notices and paid the fee. Joint Reply of Radio Broadcasters at 32 (submitted April 26, 2002); Comments of Collegiate Broadcasters at 7 (submitted April 5, 2002). The Copyright Office must recoup its costs for administering the section 112 and 114 statutory licenses; therefore it cannot waive the fee. Moreover, the $20 fee is not unreasonable or unduly burdensome. Part of the cost associated with the licenses is maintaining the public files for the notices and the Office shall continue that practice. Unfortunately, the Office is not prepared at this time to accept the submission of notices and fees electronically, and for the time being we will continue our practice of accepting only hard copies of notices and payment. It is anticipated that this may change in the future, and services using the section 112 and 114 licenses are encouraged to check the Office Web site for updates on this matter.

The Office stated in the NPRM that it was considering discontinuing its practice of posting copies of all notices on its Web site and requiring that notices be filed jointly with, or in the alternative only with, the collectives designated through the CARP process to receive and distribute royalties under the section 112 and 114 licenses. RIAA opposes elimination of the practice of posting notices on the Office Web site, arguing that the notices should be available to all copyright owners and not just those in the Washington, DC, area. Comments of RIAA at 20–21 (submitted April 5, 2002). The Office will post a list of names of those persons and entities that have filed a notice, but we will not continue to post the notices themselves. Scanning and posting the full notices is extremely costly and burdensome. When we institute our electronic filing system, we will revisit the issue. In the meantime, persons interested in viewing the notices must contact the Copyright Office.

None of the commenters favor submission of notices to the royalty collectives designated by the CARP process, either solely or jointly. See, *e.g.* Comments of the RIAA at 22–23 (submitted April 5, 2002); Joint Reply of Radio Broadcasters at 33 (submitted April 26, 2002). Consequently, the Office will not adopt such a requirement.

Updated notices, along with the $20 filing fee specified in § 201.3(e) of title 37 of the Code of Federal Regulations, shall be filed with the Licensing Division of the Copyright Office no later than July 1, 2004. The Office stated in the NPRM that it was considering requiring periodic updating of notices, perhaps on an annual basis. We are declining at this time to adopt a regular

[20] This does not mean that services will be required to keep records commencing April 1. Rather, April 1 is the beginning of the first three-month calendar quarter during which services must keep records for two weeks.

specified time period, preferring to gain experience in determining whether mandatory periodic updates by all services are necessary. The matter will be further addressed in the final regulations.

Notices of intent to use the section 112 and/or 114 licenses by new subscription services will still be required to be filed prior to the date of first transmission or the making of an ephemeral recording, and services will continue to be required to update the notice within 45 days of change in the information reported. Notices for new subscription services must be submitted to the Licensing Division of the Copyright Office accompanied by the filing fee specified in 37 CFR 201.3(e).

List of Subjects in 37 CFR Parts 201 and 270

Copyright, Sound recordings.

Interim Regulation

■ In consideration of the foregoing, the Copyright Office amends part 201 of 37 CFR and adds part 270 to 37 CFR to read as follows:

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

PART 201—GENERAL PROVISIONS

§§ 201.35 through 201.37 [Removed and Reserved]

■ 2. Remove and reserve §§ 201.35 through 201.37.

■ 3. Add part 270 to 37 CFR Chapter II, subchapter B, to read as follows:

PART 270—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

Sec.

Authority: 17 U.S.C. 702.

§ 270.1 Notice of use of sound recordings under statutory license.

(a) *General.* This section prescribes rules under which copyright owners shall receive notice of use of their sound recordings when used under either section 112(e) or 114(d)(2) of title 17, United States Code, or both.

(b) *Definitions.* (1) A *Notice of Use of Sound Recordings under Statutory License* is a written notice to sound recording copyright owners of the use of their works under section 112(e) or 114(d)(2) of title 17, United States Code, or both, and is required under this section to be filed by a Service in the Copyright Office.

(2) A *Service* is an entity engaged in either the digital transmission of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code or both. For purposes of this section, the definition of a Service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2). A Service may be further characterized as either a preexisting subscription service, preexisting satellite digital audio radio service, nonsubscription transmission service, new subscription service, business establishment service or a combination of those:

(i) A *preexisting subscription service* is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, and was in existence and making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(ii) A *preexisting satellite digital audio radio service* is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(iii) A *nonsubscription transmission service* is a service that makes noninteractive nonsubscription digital audio transmissions that are not exempt under section 114(d)(1) of title 17 of the United States Code and are made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(iv) A *new subscription service* is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(v) A *business establishment service* is a service that makes ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code and is exempt under section 114(d)(1)(C)(iv) of title 17 of the United States Code.

(c) *Forms and content.* A Notice of Use of Sound Recordings Under Statutory License shall be prepared on a form that may be obtained from the Copyright Office website or from the Licensing Division, and shall include the following information:

(1) The full legal name of the Service that is either commencing digital transmissions of sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both.

(2) The full address, including a specific number and street name or rural route, of the place of business of the Service. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(3) The telephone number and facsimile number of the Service.

(4) Information on how to gain access to the online website or homepage of the Service, or where information may be posted under this section concerning the use of sound recordings under statutory license.

(5) Identification of each license under which the Service intends to operate, including identification of each of the following categories under which the Service will be making digital transmissions of sound recordings: preexisting subscription service, preexisting satellite digital audio radio service, nonsubscription transmission service, new subscription service or business establishment service.

(6) The date or expected date of the initial digital transmission of a sound recording to be made under the section 114 statutory license and/or the date or the expected date of the initial use of the section 112(e) license for the purpose of making ephemeral phonorecords of the sound recordings.

(7) Identification of any amendments required by paragraph (f) of this section.

(d) *Signature.* The Notice shall include the signature of the appropriate officer or representative of the Service that is either transmitting the sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Notice and by the date of the signature.

(e) *Filing notices; fees.* The original and three copies shall be filed with the Licensing Division of the Copyright Office and shall be accompanied by the filing fee set forth in § 201.3(c) of this chapter. Notices shall be placed in the public records of the Licensing Division. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE, Washington, DC 20557–6400.

(1) A Service that, prior to April 12, 2004, has already commenced making digital transmissions of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code, or both, and that has already filed an Initial Notice of Digital Transmission of Sound Recordings Under Statutory License, and that intends to continue to make digital transmissions or ephemeral phonorecords following July 1, 2004, shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office no later than July 1, 2004.

(2) A Service that, on or after July 1, 2004, commences making digital transmissions and ephemeral phonorecords of sound recordings under statutory license shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral phonorecord of the sound recording and prior to the first igital transmission of the sound recording.

(3) A Service that, on or after July 1, 2004, commences making only ephemeral phonorecords of sound recordings, shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral phonorecord of a sound recording under the statutory license.

(f) *Amendment.* A Service shall file a new Notice of Use of Sound Recordings under Statutory License within 45 days after any of the information contained in the Notice on file has changed, and shall indicate in the space provided by the Copyright Office that the Notice is an amended filing. The Licensing Division shall retain copies of all prior Notices filed by the Service.

§ 270.2 Reports of use of sound recordings under statutory license for preexisting subscription services.

(a) *General.* This section prescribes rules under which preexisting subscription services shall serve copyright owners with notice of use of their sound recordings, what the content of that notice should be, and under which records of such use shall be kept and made available.

(b) *Definitions.* (1) A *Collective* is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) of title 17 of the United States Code and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f).

(2) A *Report of Use of Sound Recordings under Statutory License* is a report required under this part to be provided by the preexisting subscription service transmitting sound recordings under statutory license.

(3) A *Preexisting Subscription Service* is an entity engaged in the digital transmission of sound recordings pursuant to section 114(f) of title 17 of the United States Code.

(c) *Service.* Reports of Use shall be served upon Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f). Reports of Use shall be served, by certified or registered mail, or by other means if agreed upon by the respective preexisting subscription service and Collective, on or before the twentieth day after the close of each month.

(d) *Posting.* In the event that no Collective is designated under the statutory license, or if all designated Collectives have terminated collection and distribution operations, a preexisting subscription service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. Preexisting subscription services shall post their Reports of Use online on or before the 20th day after the close of each month, and make them available to all sound recording copyright owners for a period of 90 days. Preexisting subscription services may require use of passwords for access to posted Reports of Use, but must make passwords available in a timely manner and free of charge or other restrictions. Preexisting subscription services may predicate provision of a password upon:

(1) Information relating to identity, location and status as a sound recording copyright owner; and

(2) A "click-wrap" agreement not to use information in the Report of Use for purposes other than royalty collection, royalty distribution, and determining compliance with statutory license requirements, without the express consent of the preexisting subscription service providing the Report of Use.

(e) *Content.* A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading, and shall include a preexisting subscription service's "Intended Playlists" for each channel and each day of the reported month.

(1) The "Intended Playlists" shall include a consecutive listing of every recording scheduled to be transmitted, and shall contain the following information in the following order:

(i) The name of the preexisting subscription service or entity;

(ii) The channel;

(iii) The sound recording title;

(iv) The featured recording artist, group, or orchestra;

(v) The retail album title (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the preexisting subscription service for purchase of the sound recording);

(vi) The recording label;

(vii) The catalog number;

(viii) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

(ix) The date of transmission; and

(x) The time of transmission.

(2) The Report of Use shall include a report of any system failure resulting in

a deviation from the Intended Playlists of scheduled sound recordings. Such report shall include the date, time and duration of any such system failure.

(f) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the preexisting subscription service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the preexisting subscription service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(g) *Format.* Reports of Use should be provided on a standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc, and should conform as closely as possible to the following specifications:

(1) ASCII delimited format, using pipe characters as delimiter, with no headers or footers;

(2) Carats should surround strings;

(3) No carats should surround dates and numbers;

(4) Dates should be indicated by: MM/DD/YYYY;

(5) Times should be based on a 24-hour clock: HH:MM:SS;

(6) A carriage return should be at the end of each line; and

(7) All data for one record should be on a single line.

(h) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the preexisting subscription service providing the Report of Use.

(i) *Documentation.* All compulsory licensees shall, for a period of at least three years from the date of service or posting of the Report of Use, keep and retain a copy of the Report of Use. For reporting periods from February 1, 1996, through August 31, 1998, the preexisting subscription service shall serve upon all designated Collectives and retain for a period of three years from the date of transmission records of use indicating which sound recordings were performed and the number of times each recording was performed, but is not required to produce full Reports of Use or Intended Playlists for those periods.

§ 270.3 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

(a) *General.* This section prescribes rules under which nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services shall maintain reports of use of their sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both.

(b) *Definitions.* (1) *Aggregate Tuning Hours* are the total hours of programming that a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service has transmitted during the reporting period identified in paragraph (c)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription service, preexisting satellite digital audio radio service, new subscription service or business establishment service transmissions, less the actual running time of any sound recordings for which the service has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. For example, if a nonsubscription transmission service transmitted one hour of programming to 10 simultaneous listeners, the nonsubscription transmission service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the nonsubscription transmission service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a nonsubscription transmission service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the nonsubscription transmission service's Aggregate Tuning Hours would equal 10.

(2) An *AM/FM Webcast* is a transmission made by an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2).

(3) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses, either by settlement agreement reached under section 112(e)(3), section 112(e)(6), section 114(f)(1)(A), section 114(f)(1)(C)(i), section 114(f)(2)(A), or section 114(f)(2)(C)(i) and adopted pursuant to § 251.63(b) of this chapter, or by a decision of a Copyright Arbitration Royalty Panel under section 112(e)(4), section 112(e)(6), section 114(f)(1)(B), section (f)(1)(C)(ii), section 114(f)(2)(B), or section 114(f)(2)(C)(ii) or by order of the Librarian of Congress pursuant to 17 U.S.C. 802(f).

(4) A *new subscription service* is defined in § 270.1(b)(2)(iv).

(5) A *nonsubscription transmission service* is defined in § 270.1(b)(2)(iii).

(6) A *preexisting satellite digital audio radio service* is defined in § 270.1(b)(2)(ii).

(7) A *business establishment service* is defined in § 270.1(b)(2)(v).

(8) A *performance* is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (*e.g.*, the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(i) A performance of a sound recording that does not require a license (*e.g.*, the sound recording is not copyrighted);

(ii) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(iii) An incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(9) *Play frequency* is the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound

recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the two-week reporting period, then the play frequency is one. If the sound recording is transmitted 10 times during the two-week reporting period, then the play frequency is 10.

(10) A *Report of Use* is a report required under this section to be provided by a nonsubscription transmission service and new subscription service that is transmitting sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code, or both.

(c) *Report of Use.* (1) *Separate reports not required.* A nonsubscription transmission service, preexisting satellite digital audio radio service or a new subscription service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code and makes ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code need not maintain a separate Report of Use for each statutory license during the relevant reporting periods.

(2) *Content.* For a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for each sound recording transmitted during the reporting periods identified in paragraph (c)(3) of this section:

(i) The name of the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service making the transmissions, including the name of the entity filing the Report of Use, if different;

(ii) The category transmission code for the category of transmission operated by the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service:

(A) For eligible nonsubscription transmissions other than broadcast simulcasts and transmissions of non-music programming;

(B) For eligible nonsubscription transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming;

(C) For eligible nonsubscription transmissions of non-music programming reasonably classified as news, talk, sports or business programming;

(D) For eligible nonsubscription transmissions by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by §§ 261.3(a)(2)(i) and (ii) of this chapter;

(E) For eligible nonsubscription transmissions by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by § 261.3(a)(2)(iii) of this chapter;

(F) For eligible nonsubscription transmissions by a small webcaster operating under an agreement published in the **Federal Register** pursuant to the Small Webcaster Settlement Act;

(G) For eligible nonsubscription transmissions by a noncommercial broadcaster operating under an agreement published in the **Federal Register** pursuant to the Small Webcaster Settlement Act;

(H) For transmissions other than broadcast simulcasts and transmissions of non-music programming made by an eligible new subscription service;

(I) For transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible new subscription service;

(J) For transmissions of non-music programming reasonably classified as news, talk, sports or business programming made by an eligible new subscription service; and

(K) For eligible transmissions by a business establishment service making ephemeral recordings;

(iii) The featured artist;

(iv) The sound recording title;

(v) The International Standard Recording Code (ISRC) or, alternatively to the ISRC, the

(A) Album title; and

(B) Marketing label;

(vi) The actual total performances of the sound recording during the reporting period or, alternatively, the

(A) Aggregate Tuning Hours;

(B) Channel or program name; and

(C) Play frequency.

(3) *Reporting period.* A Report of Use shall be prepared for a two-week period (two periods of 7 consecutive days) for each calendar quarter of the year. The two weeks need not be consecutive, but both weeks must be completely within the calendar quarter.

(4) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Report, and by the date of the signature.

(5) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, without consent of the service providing the Report of Use.

(6) *Documentation.* A Service shall, for a period of at least three years from the date of service or posting of a Report of Use, keep and retain a copy of the Report of Use.

§ 270.4 Designated collection and distribution organizations for records of use of sound recordings under statutory license.

(a) *General.* This section prescribes rules under which records of use shall be collected and distributed under section 114(f) of title 17 of the United States Code, and under which records of such use shall be kept and made available.

(b) *Definitions.* (1) A *Collective* is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f).

(2) A *Service* is an entity engaged in the digital transmission of sound recordings pursuant to section 114(f) of title 17 of the United States Code.

(c) *Notice of Designation as Collective under Statutory License.* A Collective shall file with the Licensing Division of the Copyright Office and post and make available online a "Notice of Designation as Collective under Statutory License," which shall be identified as such by prominent caption or heading, and shall contain the following information:

(1) The Collective name, address, telephone number and facsimile number;

(2) A statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and

(3) Information on how to gain access to the online website or home page of the Collective, where information may be posted under this part concerning the use of sound recordings under statutory license. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE., Washington, DC 20557–6400.

(d) *Annual Report.* The Collective will post and make available online, for the duration of one year, an Annual Report on how the Collective operates, how royalties are collected and distributed, and what the Collective spent that fiscal year on administrative expenses.

(e) *Inspection of Reports of Use by copyright owners.* The Collective shall make copies of the Reports of Use for the preceding three years available for inspection by any sound recording copyright owner, without charge, during normal office hours upon reasonable notice. The Collective shall predicate inspection of Reports of Use upon information relating to identity, location and status as a sound recording copyright owner, and the copyright owner's written agreement not to utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use. The Collective shall render its best efforts to locate copyright owners in order to make available records of use, and such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(f) *Confidentiality.* Copyright owners, their agents, and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.

(g) *Termination and dissolution.* If a Collective terminates its collection and distribution operations prior to the close of its term of designation, the Collective shall notify the Copyright Office, and all Services transmitting sound recordings under statutory license, by certified or registered mail. The dissolving Collective shall provide each such Service with information identifying the copyright owners it has served.

Dated: February 26, 2004.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 04–5404 Filed 3–10–04; 8:45 am]

BILLING CODE 1410–33–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900–AL40

Eligibility for an Appropriate Government Marker for a Grave Already Marked at Private Expense

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document affirms, without any changes, the provisions of the interim final rule that was published to reflect changes made by the Veterans Education and Benefits Expansion Act of 2001 (Pub. L. 107–103) and the Veterans Benefits Act of 2002 (Pub. L. 107–330).

This final rule establishes provisions pursuant to the Veterans Education and Benefits Expansion Act of 2001 to allow the Department of Veterans Affairs (VA) to furnish an appropriate Government marker for the grave of an eligible veteran buried in a private cemetery, regardless of whether the grave is already marked with a privately purchased marker. Pursuant to the Veterans Benefits Act of 2002, the provisions of this final rule will apply to requests to mark graves or memorialize eligible veterans whose deaths occurred on or after September 11, 2001.

DATES: *Effective Date:* This final rule is effective September 25, 2003.

Applicability Date: The provisions of 38 CFR 1.631 apply to deaths occurring on or after September 11, 2001.

FOR FURTHER INFORMATION CONTACT: David K. Schettler, Director of Memorial Programs Service (MPS), National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Telephone: (202) 501–3100 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On September 25, 2003, VA published an interim final rule in the **Federal Register** (68 FR 55317). The interim final rule amended VA's burial benefits provisions to allow VA to furnish an appropriate marker for the graves of eligible veterans buried in private cemeteries, regardless of whether the grave is already marked with a privately purchased marker.

We provided a 60-day comment period that ended November 24, 2003. We did not receive any comments. Based on the rationale set forth in the interim final rule and in this document, we adopt the provisions of the interim final rule as a final rule without any changes.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any given year. This rule would have no such effect on State, local, or tribal governments, or the private sector.

Paperwork Reduction Act

This document does not contain new provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521). The Office of Management and Budget has approved the existing information collection under control number 2900–0222.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Only individual VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program number for this document is 64.202.

List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Cemeteries, Veterans.

Approved: February 25, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

PART 1—[AMENDED]

■ Accordingly, the interim final rule amending 38 CFR part 1 that was